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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1929. No. 122.

FEDERAL RADIO COMMISSION,

Petitioner,

against

GENERAL ELECTRIC COMPANY AND PEOPLE OF THE STATE OF NEW YORK.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF OF GENERAL ELECTRIC COMPANY.

CHARLES NEAVE,
STEPHEN H. PHILBIN,
JOHN W. GUIDER,
Counsel for GENERAL ELECTRIC COMPANY.

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AGAINST

GENERAL ELECTRIC COMPANY and PEOPLE OF THE STATE OF NEW YORK.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF OF GENERAL ELECTRIC COMPANY.

This cause comes before this Court upon a writ of certiorari to the Court of Appeals of the District of Columbia. The writ was granted October 14, 1929 upon petition filed June 1, 1929 (R. 395). The opinion of the Court of Appeals (R. 386-392), reported 31 Fed. (2d) 630, was filed February 25, 1929, and a petition for rehearing was denied March 9, 1929 (R. 393).

We shall, first, consider the question as to whether this Court has jurisdiction to review the judgment of the Court of Appeals in the present matter.

PART I.

This Court has no jurisdiction to review the judgment of the Court of Appeals, such judgment being administrative.

The facts upon which the question of jurisdiction arises:

The Radio Act of 1927 (44 Stat. 1162), printed as an appendix in brief of petitioner, was intended to regulate interstate and foreign radio communication, and it provided that no such communication should be conducted except in accordance with the Act and with a license granted under the provisions of the Act (Sec. 1). It created the petitioner, the Federal Radio Commission, to perform such regulation in the manner specified in the Act (Secs. 3, 4). By amendments of 1928 and 1929 (Appendices B and C in petitioner's brief, pp. 143, 145) no license for a broadcasting station shall, at present, be granted for a period to exceed three months.

Secs. 9 and 10 provide for application for license; and the first paragraph of Section 11 provides as follows:

> "If upon examination of any application for a station license or for the renewal or modification of a station license the licensing authority shall determine *that public interest, convenience, or necessity would be served by the granting thereof**, it shall authorize the issuance, renewal or modification thereof in accordance with said finding. In the event the licensing authority upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe."

The respondent, General Electric Company, on January 14, 1928 applied, under the Radio Act, for a renewal of the

* Italics ours, in all quotations throughout this brief.

broadcasting license for its station, known as WGY (R. 89-95), which had for many years been conducting full time operation (as distinguished from "limited" time, see p. 24, *infra*) at a frequency of 790 kilocycles. Without giving a hearing to the respondent or to any representative of the community dependent upon WGY for service, the Commission refused to allow WGY to continue to operate during the evening hours, and instead gave a license for only limited time operation, it having, on October 12, 1928, decided that the limited time license "will serve public interest, convenience and necessity" (R. 107, 131).

The Commission took the arbitrary position that it could act upon a renewal application as it saw fit, decreasing hours of operation, power etc., without any hearing and without any appeal from its decision, provided only that the applicant receives *some* kind of a license. The Radio Act was, however, so drawn as to prevent any such arbitrary action.

In this connection that Act provides as follows:

"Sec. 16. *Any applicant* for a construction permit, for a station license, or *for the renewal* or modification *of an existing station license whose application is refused by the licensing authority shall have the right to appeal from said decision to the Court of Appeals of the District of Columbia;* and any licensee whose license is revoked by the commission shall have the right to appeal from such decision of revocation to said Court of Appeals of the District of Columbia or to the district court of the United States in which the apparatus licensed is operated, by filing with said court, within twenty days after the decision complained of is effective, notice in writing of said appeal and of the reasons therefor.

"The licensing authority from whose decision an appeal is taken shall be notified of said appeal by service upon it, prior to the filing thereof, of a certified copy of said appeal and of the reasons therefor. Within twenty days after the filing of said appeal the licensing authority shall file with the court the originals or certified copies of all papers and evidence presented to it upon the original application for a permit or license or in the hearing upon said order of revocation, and also a like copy of its decision thereon and a full statement in writing of the facts and the grounds for its decision

as found and given by it. Within twenty days after the filing of said statement by the licensing authority either party may give notice to the court of his desire to adduce additional evidence. Said notice shall be in the form of a verified petition stating the nature and character of said additional evidence, and the court may thereupon order such evidence to be taken in such manner and upon such terms and conditions as it may deem proper.

"At the earliest convenient time *the court shall hear, review, and determine* the appeal upon said record and evidence, and *may alter or revise the decision appealed from and enter such judgment as to it may seem just.* The revision by the court shall be confined to the points set forth in the reasons of appeal."

The respondent appealed from the refusal to renew its station license and the Court of Appeals, in accordance with the power conferred on it by the terms of the Act, proceeded to "hear, review and determine the appeal".

In doing so, the Court of Appeals did not base its decision on a finding that the Commission's action had wrongfully deprived the respondent "of its property rights by preventing full time operation of station WGY". On the contrary, it rejected that as its ground for decision (last paragraph on p. 390). The Court said, however, that (p. 391):

> "The terms and conditions of the various licenses received and enjoyed by appellant as herein recited also tend to confirm the view that if the time limitation imposed by the Commission upon WGY *be reasonable and such as to serve the public convenience, interest, or necessity,* the order should be sustained; otherwise it should be overruled. Upon this point, however, we feel that the contention of the appellant [respondent here] should be sustained".

The Court of Appeals reviewed the facts (R. 386-392) and held that "the refusal of the Commission to renew its license except as modified with respect to the time of operation amounted to a refusal of a renewal within the sense of the Act of 1927" (p. 390), and that (p. 391):

> "In view of the service to the art hitherto rendered by WGY and still continued by it, with the resulting ad-

vantages to the public, and in view also of the 'public convenience, interest and necessity' of so great a constituency for the full time operation of the station, it appears that *the restriction complained of is not reasonable and should not be enforced.*"

And (p. 392):

"We are convinced that the public interest would be enhanced by granting full time to the latter station", namely, WGY.

So, in accordance with the power conferred by the terms of the Act of 1927 to "enter such judgment as to it may seem just", the Court of Appeals entered the following judgment (R. 393):

"It is now here ordered and adjudged by this court that the appellant, the General Electric Company, was, on November 11, 1928, and is now, entitled to receive from the Federal Radio Commission a renewal of its license to operate station WGY upon the same terms as those contained in the license dated November 1, 1928, to wit, upon 790 kilocycles with power of 50 kw., and without time limit for operation; and that this cause be and the same is hereby remanded to the Federal Radio Commission to carry this judgment into effect, costs to be assessed against the appellee."

That is the judgment here sought to be reviewed.

Argument.

(a) *The judgment, if administrative cannot be reviewed:*

Congress has power to "vest courts of the District (of Columbia) with administrative or legislative functions which are not properly judicial." *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U. S. 693, 700.

In *Keller* v. *Potomac Electric Company*, 261 U. S. 428, it appeared that the Public Utilities Act of the District of Columbia created the Public Utilities Commission and vested in it the power to investigate the reasonableness, lawfulness

and adequacy of the rate or service and to change the same. The Act further provided that any party dissatisfied with any decision of the Commission may commence a proceeding in equity in the Supreme Court of the District

> "to vacate, set aside, or modify any such decision or order on the ground that the valuation, rates", etc. "fixed in such order is unlawful, inadequate, or unreasonable * * *.
>
> * * * "Any party, including said commission, may appeal from the order or decree of said court to the Court of Appeals of the District of Columbia, and therefrom to the Supreme Court of the United States * * *."

The Court stated (p. 440):

> "What is the nature of the power thus conferred on the District Supreme Court? Is it judicial or is it legislative? Is the court to pass solely on questions of law, and look to the facts only to decide what are the questions of law really arising, or to consider whether there was any showing of facts before the Commission upon which, as a matter of law, its finding can be justified? Or has it the power, in this equitable proceeding to review the exercise of discretion by the Commission and itself raise or lower valuations, rates, or restrict or expand orders as to service? *Has it the power to make the order the Commission should have made?* If it has, then the court is to exercise legislative power in that it will be laying down new rules, to change present conditions and to guide future action and is not confined to definition and protection of existing rights."

The Court then said (p. 441):

> "To modify or amend a valuation, or a rate, or a regulation of the Commission as inadequate, as the court is authorized to do, seems to us necessarily to import the power to increase the valuation, or rate, or to make a regulation more comprehensive, and to consider the evidence before it for this purpose. In other words, the proceeding in court is an appeal from the action of the Commission in the chancery sense."

The Court held that the situation is not analogous to that existing under the Act creating the Commerce Court (the jurisdiction of which was later conferred on the District Courts of the United States) and giving it jurisdiction of all cases brought to enforce, set aside or annul or suspend any order of the Interstate Commerce Commission. The Court said (p. 442) that this Act

> "permits these Courts to consider all relevant questions of constitutional power or right and all pertinent questions whether the administrative order is within the statutory authority, or is an attempted exercise of it so unreasonable as not to be within it; but these are questions of law only. *Interstate Commerce Commission* v. *Illinois Central R. R. Co.* 215 U. S. 452, 470. Of course, the consideration and decision of questions of law may involve a consideration of controverted facts to determine what the question of law is, but it is settled that any finding of fact by the Commission, if supported by evidence is final and conclusive on the courts. *Interstate Commerce Commission* v. *Union Pacific R. R. Co.* 222 U. S., 541, 547."

Also, as to the attempted analogy with the review of orders of the Federal Trade Commission, the Court held (p. 442):

> "A similar distinction exists between the jurisdiction here conferred and that vested in circuit courts of appeals in reference to proceedings before the Trade Commission."

Comparing the Public Utilities Act with those creating the Interstate Commerce Commission and the Federal Trade Commission, the Court said (p. 442):

> "The language of the act under discussion is much wider than that of the Interstate Commerce Act or of the Federal Trade Commission provisions. It brings the court much more intimately into the legislative machinery for fixing rates than does the Interstate Commerce Act. *We can not escape the conclusion that Congress intended that the court shall revise the legislative dis-*

cretion of the Commission by considering the evidence and full record of the case and entering the order it deems the Commission ought to have made."

The Court then held invalid that portion of the Public Utilities Act giving an appeal to this Court, saying (pp. 443-4):

> "The court proceedings to review the orders of the Commission authorized by paragraph 64 are expressly required to conform to equity procedure. In that procedure, an appeal brings up the whole record and the appellate court is authorized to review the evidence and make such order or decree as the court of first instance ought to have made, giving proper weight to the findings on disputed issues of fact which should be accorded to a tribunal which heard the witnesses. This Court is, therefore, given jurisdiction to review the entire record and to make the order or decree which the Commission and the District Courts should have made.
>
> *"Such legislative or administrative jurisdiction, it is well settled can not be conferred on this Court either directly or by appeal."*

In *Postum Cereal Company* v. *California Fig Nut Company,* 272 U. S. 693, there was an appeal from the decision of the Court of Appeals of the District in a proceeding to review a decision of the Commissioner of Patents refusing to cancel the registration of a trademark. The Court held that the decision of the Court of Appeals is not a judicial judgment but a mere administrative decision "by a Court which is made part of the machinery of the Patent Office for administrative purposes"; and that the Supreme Court "can only review judicial judgments" (pp. 688-689).

The Court concluded (p. 701):

> "With this limitation upon our powers, it is not difficult to reach a conclusion in the present case. We should have had no power to review the action of the District Court of Appeals if it had heard the appeal and taken administrative jurisdiction, and by the same token have now no power to review its action in refusing such jurisdiction.

> "But it is said that this leaves the appellant without any remedy to review the decision of the District Court of Appeals and makes its conclusion final in respect of the construction of the Trade-Mark Act of 1920. Even if this be so, as to which we express no opinion, it cannot furnish a reason for exceeding the constitutional powers of this Court."

In re Vidal, 179 U. S. 126, was an application for leave to file a petition for certiorari. The Court, after quoting Sec. 716 of the Revised Statutes (Judicial Code, Sec. 262; Title 28 U. S. C. Sec. 377) held that the military courts were not constitutional courts and that, therefore, the application should be denied, saying:

> "Nor are such tribunals courts with jurisdiction in law or equity within the meaning of those terms as used in the Third Article of the Constitution, and the question of the issue of the writ of certiorari in the exercise of inherent general power cannot arise in respect to them."

So it would seem to be clear that, if the judgment of the Court of Appeals, in the present controversy, was legislative or administrative in character, this Court cannot review it.

(b) *The judgment was purely administrative:*

The Commission is to grant, or renew, a license if "public interest, convenience, or necessity would be served by the granting thereof" (Radio Act, Sec. 11, *supra,* p. 2). But the Commission is not to be the sole and final judge as to whether or not such public interest, convenience or necessity would be served. An applicant whose application is refused "shall have the right to appeal from said decision to the Court of Appeals of the District of Columbia" which "shall hear, review and determine the appeal" and "may alter or revise the decision appealed from and enter such judgment as to it may seem just" (Radio Act, Sec. 16, *supra,* p. 3).

Certainly the Commission itself acts as a purely administrative or executive body. And certainly the provision of the Act as to appeal "brings the court much more intimately

into the" administrative machinery than did the Public Utilities Act considered in *Keller* v. *Potomac Electric Co.*, p. 5, *supra*, where the statute gave the Court power "to vacate, set aside or modify any such decision" without adding (as does the Radio Act) the power to "enter such judgment as to it may seem just". As was said in the *Keller* case, "we cannot escape the conclusion that Congress intended that the Court shall revise the legislative discretion of the Commission by considering the evidence and full record of the case and entering the order it deems the Commission ought to have made."

This conclusion is further enforced by the provision in Sec. 16 of the Radio Act (p. 3, *supra*) that if, after the appeal has been taken, either party gives "notice to the court of his desire to adduce additional evidence", the court "may thereupon order such evidence to be taken in such manner and upon such terms and conditions as it may deem proper". The court is then to hear and determine the appeal not only upon the record brought up from the Commission but "upon said record and evidence"—evidence which may never have been before the Commission at all.* So the Court of Appeals is given full power and opportunity to ascertain the facts, for itself, and to weigh those facts and then "enter such judgment as to it may seem just" or, as expressed in the *Keller* case, enter "the order it deems the Commission ought to have made".

It is clear that Congress, in enacting the Radio Act, *intended* to make the review afforded by the Court of Appeals administrative. While the bill was in the House, an amendment was proposed whereby jurisdiction of appeals would be

* In this respect, as well as in others, the Radio Act differs from the Federal Trade Commission Act (Act of Sept. 26, 1914, c. 311, 38 Stat. 717). In the latter, while additional testimony may be ordered to be taken, such testimony must "be taken before the Commission" (Sec. 5) which must report thereon; and "the findings of the Commission as to the facts, if supported by testimony, shall be conclusive"—which provision does not occur in the Radio Act.

conferred upon the several Federal Courts, instead of upon the Court of Appeals of the District of Columbia. Such amendment was successfully opposed by Mr. White, upon the ground that the administrative review which it was desired to obtain could not be granted to the United States District Courts, although it could be granted to the Court of Appeals of the District of Columbia. Mr. White said (Cong. Rec. 69th Cong., 2d Sess. Part 2, p. 5567):

> "Mr. Chairman, I want to say for myself and the members of the committee that we stand on the principle of law laid down in the case cited (*Keller* v. *Potomac Electric Power Company*). We believe it is unconstitutional to attempt to impose on the Federal courts of the United States the administrative and legislative functions which are involved in this amendment."

It is interesting to note that the first paragraph of Sec. 16, of the Radio Act, down to the semicolon, vests in the Court of Appeals of the District appeals from refusals to grant, renew or modify a station license, while the latter part of that paragraph deals with *revocation* of licenses and vests appeals from a decision of revocation in the Court of Appeals of the District or "in the district court of the United States in which the apparatus licensed is operated." These words do not affect the situation now before the Court, because they apply to revocation and not renewals of licenses. Nor does their presence in the Act even tend to prove that the jurisdiction on appeal is other than administrative. In *ex parte Bakelite Corporation*, 279 U. S. 438, it was urged that the provision "purporting to authorize temporary assignments of circuit and district judges to the Court of Customs Appeals when vacancies occur" showed that Congress intended the Court to be a constitutional court. This Court held (p. 460):

> "But, if there be constitutional obstacles to assigning judges of constitutional courts to legislative courts, the provision cited is for that reason invalid and cannot be

saved on the theory that Congress intended the court to be in one class when under the Constitution it belongs in another."

Again, in *Keller* v. *Potomac Electric Co.*, p. 5, *supra*, this Court held that the fact that the Public Utilities Law provided for an appeal to the Supreme Court did not mean that the proceeding under Section 64 of the Law was otherwise than administrative or legislative; the Court merely held that that portion of Section 64 was invalid.

Judge Davis in his book, *The Law of Radio Communication*, (pp. 75, 76) points out the administrative character of the review in the Court of Appeals of the District of Columbia which is afforded by the Radio Act:

> "Under Section 16 of the act, any person whose application is rejected may appeal to the Court of Appeals of the District of Columbia where he is entitled to a hearing and determination *de novo*. The provision follows that already in force for obtaining a review of certain decisions of the Commissioner of Patents and of the Public Utility Commission of the District of Columbia. While the result is undoubtedly to impose upon the court the performance of an administrative rather than a judicial function, the power of Congress to so provide has been upheld by the Supreme Court in cases arising under the previous statutes."

No analogy helpful to the petitioner can be drawn from the National Prohibition Act. That Act authorizes a review by the Federal District Courts of a decision of the Commissioner revoking or refusing an application for a permit, as follows (Sec. 5):

> "The manufacturer may by appropriate proceeding in a court of equity have the action of the Commissioner reviewed and the Court may affirm, modify or reverse the finding of the Commissioner as the facts and law of the case may warrant * * *."

Judge Thacher, in *Smith* v. *Foster*, 15 Fed. (2d) 115 (D. C. S. D. N. Y.), points out that the review by the District

Court is judicial, and that the Court cannot "try the case over again upon new evidence not before the Commission". Judge Thacher correctly states that to do so would substitute "the action of the Court for the action of the Commission, and result in new conclusions of law and of fact reached by the Court not considered by the Commissioner". But Section 16 of the Radio Act expressly provides for trying the case over again upon new evidence (p. 3, *supra*), and empowers the Court of Appeals not only to "alter or revise" the decision appealed from *but also* to "enter such judgment as to it may seem just."

Likewise, the Federal Trade Commission Act, as pointed out in the *Keller* case (p. 5, *supra*), gives to the court no such broad powers as those given by the Public Utilities Act, there under consideration, nor as the still broader powers given by the Radio Act (see, also, foot note, p. 10, *supra*).

Petitioner contends that the Court of Appeals held invalid a regulation of the Commission and, in doing so, acted as a judicial, and not an administrative, body. But the Court of Appeals did not hold invalid any regulation of the Commission; it decided that WGY was entitled to a renewal of its license because "public interest, convenience or necessity" would thus best be served. The validity of an authority exercised under the United States is not in question. The respondent does not dispute the authority of the Federal Radio Commission to make regulations which it has made (numbers of cleared channels, wave lengths etc), but does dispute the act of the Commission, in refusing to renew the WGY license for operation upon one of those cleared channels (see foot note, p. 22, *infra*). As this Court pointed out in *Taylor* v. *Taft*, 203 U. S. 461, quoting from *U. S.* v. *Lynch*, 137 U. S. 280:

> "The validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is the validity of an authority, every time an act done by such authority is disputed * * *.
>
> "What the relator sought was an order coercing these officers to proceed in a particular way, and this order

> the Supreme Court of the District declined to grant. If we were to reverse that judgment upon the ground urged, it would not be for want of power in the Auditor to audit the account, and in the Comptroller to revise and pass upon it, but because those officers had disallowed what they ought to have allowed and erroneously construed what needed no construction. This would not in any degree involve the validity of their authority."

The petitioner contends that because the Court of Appeals assessed costs, its decision that the WGY license should be renewed was judicial, and not administrative. That is not so.

"Taxable costs are made so either by statute, rule of court, or order of court in a specific case, or by established usage, the equivalent of a rule". *Parkerson* v. *Borst,* 256 Fed. (C. C. A., 5th Cir.) 827, 828. Prior to the passage of the Radio Act of 1927, Rule XIX of the Court of Appeals provided as follows:

> "3. In cases of reversal of any judgment, order or decree by this court, costs shall be allowed to the appellant, unless otherwise ordered by this court."

Congress, in providing that an appeal could be taken to the Court of Appeals unquestionably gave that court full jurisdiction, not limited so that it could not apply its rules in the case of a reversal of the order of the Commission.

Further, even if the Court of Appeals erred in awarding costs, which is denied, such error certainly could not affect the nature of the powers vested in the Court by the Radio Act. If such powers are administrative, the Court of Appeals cannot change them by allowing costs.

The petitioner finally contends that the grant of a stay order pending appeal (R. 380), establishes that the powers of the Commission were judicial, in deciding that the WGY license should be renewed. The Court of Appeals was given, by Sec. 16 of the Radio Act, specific power to "hear, review, and determine the appeal" and to "enter such judgment as

to it may seem just". And, in the exercise of this jurisdiction, it had inherent power to issue orders in support thereof, and the power to enter intermediate judgments or orders in aid of its final judgment.

The Act establishing the Court of Appeals, February 9, 1893, 27 Stat. 434, Sec. 11, is as follows:

> "Sec. 11. That the said Court of Appeals shall have power to issue all necessary and proper remedial prerogative writs in aid of its appellate jurisdiction."

The Court could not act effectively in its appellate powers if it were powerless to preserve the *status quo* pending appeal. Without such power, the decision of the Court of Appeals might well be futile.

(c) *Conclusion as to jurisdiction:*

The real test is whether the Court of Appeals had "the power to make the order the Commission should have made". *Keller* v. *Potomac Elec. Co.,* 261 U. S. 428, 440. It seems to us to be clear that the Court of Appeals does have that power, and, consequently, that it was acting as an administrative body and this Court has no power to review its action.

And, as was said in the *Postum Cereal* case (p. 9, *supra*), if this makes the judgment of the Court of Appeals final, that "cannot furnish a reason for exceeding the constitutional powers of this court".

If, however, this Court decides that it has jurisdiction, then the merits of the controversy are to be examined.

PART II.

Statement of the Facts on the Merits.

1. *The Record.*

Sec. 16 of the Radio Act (p. 3, *supra*) provides that an applicant who appeals from the Commission shall serve upon the Commission and file "a certified copy of said appeal and of the reasons therefor" and that, within twenty days after appeal, the Commission "shall file with the Court the originals or certified copies *of all papers and evidence presented to it* upon the original application for a permit or license * * * and also a like copy of its decision thereon and a full statement in writing of the facts and the grounds for its decision as found and given by it". So much is compulsory.

In addition, within twenty days after the filing of the Commission's statement, "either party may give notice to the Court of his desire to adduce additional evidence * * * and the Court may thereupon order such evidence to be taken in such manner and upon such terms and conditions as it may deem proper".

In the present matter, the respondent served and filed the required copy of the appeal "and of the reasons therefor". These appear at pages 1-9, 14-23 with exhibits (filed with the Commission with the application for license) at pages 205-282.

Thereafter, the Commission filed copies "of all papers and evidence presented to it" upon the application and "a full statement in writing of the facts and the grounds for its decision as found and given by it". These consist of the following, appearing at the following places in the Record:

Statements of facts and grounds for decision, pages 23-48, 49-52.

Exhibits, pages 54-204 and 282-363.

The Court of Appeals, accordingly, had before it all of the facts which were before the Commission itself.

Each party seems to have felt that the papers, thus filed, correctly set forth the pertinent facts and all of such facts. For, though each had an opportunity "to give notice to the court of his desire to adduce additional evidence", no such notice was given.

The controlling facts are not in dispute. We shall state them in chronological order.

2. *The community dependent upon WGY:*

The community dependent upon WGY is largely located in Albany, Schenectady, Troy, Amsterdam, Utica and many villages and rural sections not only in Central and Northern New York but also in Vermont, Western Massachusetts and New Hampshire. These communities are dependent upon WGY because they are outside of the good service area of any first class broadcasting station other than WGY (Rec. 3, 210).

The great, almost vital, importance of WGY to these communities can be appreciated from the storm of protest which spontaneously arose, when it became known that the Radio Commission was proposing to cancel the license of WGY to operate in the evening. The following extracts are typical of thousands of letters that have been received by the company or the Commission, many of which were before the Commission as a part of the respondent's application for renewal of its license.

From Frank Bigelow, lawyer, Malone, N. Y., to United States Radio Commission (R. 216):

> "I can scarcely conceive of any other possible action that could more deeply injure the users of radio receivers in all this 'North Country' for it will amount almost to confiscation of the money now invested in radio sets in the northern tier of counties in New York State, and I think of many more counties to the south and in Vermont, * * *

PART II.

Statement of the Facts on the Merits.

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"If the common people who listen to broadcasting in northern New York felt sure that a letter would do any good, I think within the next forty-eight hours you would receive about one hundred thousand letters at least protesting as strongly as I am doing against your crippling WYG in this matter."

From Wallace L. McNeil, Charlotte, Vt., to WGY, enclosing letter to Senator Greene (R. 220):

"* * * Tonight, for instance, at 8/10 o'clock, WGY is coming very well, while only at WJZ and WEAF is it possible to hear any signal, and both these are too weak for any value. I was just talking with a neighbor over the 'phone and she mentioned that if WGY goes off the air, their receiver will be junked, as no other station reaches us with any steady reliability.

"* * * I doubt if you appreciate half what WGY means to Vermont and Northern New York. For balance of programme, combining as you do, market reports, etc., studio and local programmes and connections with WEAF, for all-round value, I believe WGY is our best example, not only of what a well-balanced radio station *could* be, but *is*."

From A. G. Meston, Pittsfield, Mass., to WGY (R. 221):

"I am only one of many hundreds who living in this particular district, depend almost entirely on WGY for radio entertainment. If this station were taken away, as there is talk of so doing, it would mean that all radio sets, whether powerful or otherwise, would be practically of no use to their owners.

"My own set is a fair average, being a six-tube Fada, but unless it is an exceptional night, I get no dependable reception except through WGY. That has been the one and only salvation of people living in this part of the country."

From Murray A. Dekin, Lowville, N. Y., to WGY (R. 223):

"* * * For nearly six years WGY has been and continues to be the backbone of local radio entertainment. * * *

"Please do not construe that the basis for the above statements is the ownership of an inferior radio set, as I am more than satisfied with the Zenith machine which I now own."

From Grace T. Halliday, Oneida, N. Y., to WGY (R. 223):

"* * * Were it not for WGY the radio would be of little value many nights, as reception is such that many other stations cannot be brought in. If WGY is taken off the air I may as well sell my set, which is a Grebe and therefore not a cheap set."

From J. H. McLear, Gouverneur, N. Y., to Radio Commission (R. 225):

"My attention has just been called to the outrageous ruling just issued by your commission, whereby WGY broadcasting station of the General Electric Co., at Schenectady is to be silenced during the evening hours.

"For your information I beg to say that WGY is about the only source of radio waves which is at all dependable for the people residing in Northern New York."

These facts regarding the operation of WGY are not, and can not, be questioned. They were all before the Commission when it refused to renew WGY's full time license.

3. *The operation of, and licenses to, WGY:*

The respondent commenced to operate its broadcasting station WGY in February, 1922 (R. 2, 24). It is the tenth oldest broadcasting station in the United States (R. 2), and its record as a pioneer, development station is second to none. The Department of Commerce made it one of its development stations, and, to a very large extent, the development of modern transmitting and receiving apparatus is due to the work done at that station (R. 3).

Its first license was under the Act of 1912 and was dated February 4, 1922 (R. 59-65). The license was revocable

only for cause (R. 59). At that time there were very few broadcasting stations, transmitting powers were small, and all such stations could, and did, operate on the same channel, namely, 360 meters which corresponds with 832.8 kilocycles (R. 66). Station WGY continued to operate at this frequency until September 27, 1922, when the common broadcasting frequency was changed to 400 meters or 749.6 kilocycles (R. 66).

On May 21, 1923, WGY established its operations on a wave length of 380 meters, or 790 kilocycles, and it has been operating at this frequency, on full time, ever since that time (R. 66-68). This wave length was maintained by WGY as an exclusive channel except as follows:

In 1923, the Rensselaer Polytechnic Institute at Troy, New York, a neighboring educational institution, began broadcasting at the frequency of 790 kilocycles for one night each week. This station was known by the call letters WHAZ. This use did not interfere with the broadcasting operations of WGY as at that time carried on. WHAZ continued to broadcast one night each week until November 1, 1927 (R. 192).

During a few months in 1927, the Radio Commission authorized low-powered stations (500 watts or less) to operate in Nebraska, Tennessee, Florida and California at a frequency of 790 kilocycles (R. 192, 193). The experiment was soon abandoned and it does not appear that these stations substantially interfered with the operations of WGY.

Aside from this, which did not involve any loss of service to the community dependent upon WGY, that station has operated on a cleared channel without interference ever since May 21, 1923. Over a million and a half dollars has been invested in the station in reliance upon a right to continue its operations (R. 3).

The program service given has always been of the highest quality. And the great importance, perhaps necessity, of its service to the communities of Northern New York, Vermont, New Hampshire and Massachusetts, is impressively clear.

On November 1, 1927, the Commission, which had been established by the Radio Act of 1927, issued a broadcasting license to WGY, for unlimited time of operation, at a frequency of 790 kilocycles, and power output of 50,000 watts (R. 88, 89), this license being thereafter extended to November 11, 1928.

4. The application for renewal:

On January 14, 1928, the respondent filed an application for renewal of the foregoing license (R. 90-95).

This application set forth the location of the station in Schenectady, N. Y.; its daily periods of actual operation including from six o'clock to late at night, the average time of closing being 11.45; 790 kilocycles as the frequency used and 50 K. W. as the power; and containing the following answer to the following question:

> "12. Why will the operation of the station be in the public convenience, interest, and necessity? The population within 100 miles of Schenectady exceeds 1,400,000. This community, including Albany (New York State capital), Troy, Amsterdam, Utica, and many villages and rural sections, has depended almost entirely on WGY during the past six years for radio programs. The New York City, Boston, Springfield and Buffalo stations are not well received in this vicinity on account of fading. Many more distant listeners have depended on WGY for a comparatively reliable program source. Public interest has been clearly indicated in listeners' letters commenting on WGY's services in broadcasting political and educational talks, police reports, music and entertainment of varied character so selected that they would fill the needs of our comparatively large rural audience which is especially dependent on radio during leisure hours. WGY has the resources of the research laboratories of the General Electric Company and is used as a developmental station for testing new inventions and ideas. Among the major improvements developed in connection with WGY are: Higher powered transmitters; large vacuum tubes; condenser microphones; accurate maintenance of assigned frequency (WGY was the senior Bureau of Standards standard

frequency station); short wave developmental broadcasting including a 32.77 meter, and a 22 meter transmitter operating on regular schedules; development of means for improving audio frequency characteristics bettering the quaity of broadcasting; antenna design. Thus, WGY has assisted in designing transmitters for other stations desirous of taking advantage of current developments. It is believed that because of its part in the development of the radio art and its service to broadcast listeners, the WGY station activities could not be discontinued without imposing a real public hardship."

On August 30, the Commission issued General Order 40, allotting various frequencies to each of the five zones established under the Radio Act, including the allotment of 790 kilocycles to the Fifth Zone which is on the Pacific Coast (R. 100, 101). This General Order 40 did not state what stations were to have the frequencies.*

The application for renewal of the WGY license was still pending, unacted upon, when General Order No. 40 was issued.

On September 11, the Commission sent to broadcasting stations, including WGY, a *tentative* allocation (R. 107), dated September 8 (R. 105), including station WGY as a *limited time* station, operating on 790 kilocycles (R. 109).

Immediately upon receipt of this notice, the respondent through correspondence and interviews endeavored to have the Commission modify this tentative plan, and to obtain a renewal, as applied for on January 14, 1928, of the WGY license then in effect (R. 115-129, 162-188). On October 6,

* The petitioner repeatedly insists that General Order 40 is attacked in this cause. That is not so. No question is here made of the right of the Commission to allot frequencies among the various zones. And respondent does not assert any right to the particular frequency of 790 kilocycles as against any equivalent frequency. The substantial issue is the right of the Commission to close down WGY, wholly or partially, without cause shown.

1928, the respondent filed an application for modification of the tentative allocation, asking for a full time license for WGY (R. 125).

The respondent, as late as October 27, was still inquiring as to what license was to be given, "either as heretofore or on the new allocation" (R. 187).

On October 23, the respondent, having heard nothing as to the fate of its application, and it being doubtful whether an application such as it had filed on October 6 for modification of a tentative allocation was authorized by the terms of the Radio Act, filed still another application for renewal of the WGY license (R. 206-216), out of an abundance of caution and to bring the matter of its application again definitely before the Commission in order to protect not only its own rights but also the rights of those sections of the country dependent upon WGY. This application specified as follows (R. 213):

> 'The General Electric Company is satisfied with its present frequency but understands that the same, under a plan of reallocation, has been assigned to the Fifth Zone. If, therefore, such frequency is no longer available, the General Electric Company is prepared to accept in lieu thereof, an equivalent frequency which will enable it to continue the service which it has rendered in the past. The General Electric Company will also accept a power assignment equal to the maximum allowed any other station".

5. *The action of the Commission:*

Meanwhile, and without the knowledge of the respondent, the Commission had held a meeting on October 12 at which it decided not to renew the license (R. 61), it having determined (R. 107, 131) that the revised allocations

> "will serve public interest, convenience or necessity and are necessary to prevent interference between broadcasting stations".

And, the order of the Commission states (R. 133):

> "1. That to each broadcasting station listed in said revised allocation which has an application for renewal

of its license pending before the Commission, a renewal license be issued for the frequency, power and hours of operation indicated in said revised allocation.

* * * * * *

4. That each license or renewal license issued under the foregoing directions be so worded as to take effect on November 11th at the hour of 3 o'clock A. M., Eastern Standard Time and to terminate on January 31st, 1929 at the hour of 3 o'clock A. M., Eastern Standard Time.

* * *

790 Kilocycles:

WGY.....	Schenectady, N. Y.....	Gen. Elec. Co.	50,000 ltd. time
KGO.....	Oakland, Cal.....	Gen. Elec. Co.	10,000

(R. 138).

In accordance with this order, a license dated October 17, 1928, was subsequently issued to the respondent for a limited time of operation of WGY effective at 3 A. M. November 11, 1928 (R. 188, 189). This license was received by General Electric Company on October 29, 1928 (R. 269).

By General Order No. 48 dated October 24, 1928, a limited time broadcasting station was defined as follows (R. 111-112):

"A limited time broadcasting station is hereby defined as a station which, under its license from this Commission, is permitted to operate during hours allowed daytime broadcasting stations as specified in General Order No. 41, and in addition during certain time temporarily not used by the unrestricted station or stations on the same frequency. An example is the use of late evening hours by a limited time broadcasting station in the West after closing of an Eastern station on the same frequency.

A limited time broadcasting station desiring to operate after sunset shall so notify the Commission, which will ascertain what hours the use of which is not desired by the unrestricted station or stations on the same frequency, and will thereafter authorize the operation of the limited time station accordingly, subject, however, to the right of said unrestricted station or stations to reclaim the use of such hours upon reasonable notice to the Commission and to the limited time broadcasting station.

A limited time broadcasting station will not be permitted to operate at any time when its operation will cause heterodyne interference with other broadcasting stations assigned to the same frequency."

A daytime broadcasting station is defined by Order No. 41, dated September 4, 1928 (R. 109):

> "*It is ordered* that a daytime broadcasting station is hereby defined as a station which under its license from this Commission is permitted to operate only during certain designated hours during the daytime and is not permitted to operate at any time when its operation will cause heterodyne interference with other broadcasting stations assigned to the same frequency.
>
> No daytime station will be permitted to operate after the average time for sunset during any particular month, to be determined from time to time by the Chief Engineer of the Commission. The time of such sunset shall be taken with reference to the location of the transmitter of the daytime broadcasting station unless it is the farthest East of the stations assigned to the same frequency; in this event the time shall be taken with reference to the location of the transmitter of the nearest broadcasting station on the same frequency located to the West of such daytime broadcasting station."

The Chief Engineer of the Federal Radio Commission ascertained the average times of sunset for each month of the year at Oakland, California, finding the earliest sunset time, in Pacific time, to be 4:56 and the latest, 7:32 (R. 130).

Radio is most used immediately after darkness from September until March (R. 349, 356), as is a matter of common knowledge.

The order of the Commission was, accordingly, a direction to the respondent to close down station WGY at 8:32 in the evening in October, 8:01 in November, 7:56 in December, 8:17 in January, 8:48 in February, and 9:18 in March. This was tantamount to a cancellation of the license of WGY.

The respondent, having been advised on October 29 that its application for renewal of its full time operation license

would not be granted, made a final effort before the Commission, under date of November 3, in the form of an application for modification of the limited time license of October 17, with request to be heard on November 7 or 8 (R. 270), as the then existing license was due to expire on November 11. No hearing was granted.

6. *The appeal to the Court of Appeals:*

On Friday, November 9, 1928, no hearing having been granted by the Commission and the WGY license being about to expire on November 11, the respondent appealed to the Court of Appeals (No. 4870 in that court) and, to preserve the *status quo* during determination of the appeal, motion was made and granted, after hearing counsel for the Commission and for the respondent, for a stay pending appeal (R. 380).

At the insistence of the Commission, the Court of Appeals set the argument for the earliest possible date, viz. December 3rd. At that time, there was before the Court "notice in writing of the appeal and of the reasons therefor" (R. 1-8), as provided in Section 16 of the Radio Act, submitted by the respondent, the substance of the reasons being the failure of the Commission to renew the WGY full time license. It then became the duty of the Commission to present to the Court the evidence upon which it based its decision to deny full time operation to WGY.

On November 27, the Commission filed a motion to dismiss the appeal, on the ground that it was premature, among other reasons (R. 364-367). On November 30, the respondent filed a second notice of appeal (No. 4880 in that court), to meet any possible question of the appeal being premature.

On December 1 and 3, the Commission and the respondent filed their respective briefs, and on December 3 and 4, the cause was fully argued before the Court of Appeals. Because the record was not printed prior to the argument, the briefs did not refer to any record. It was agreed, for the aid of the Court, that briefs might subsequently be submitted, which

would refer to such record as might be finally prepared and filed by the Commission.

This record was completed on January 10, 1929. The respondent filed on February 8, a brief identical with its former brief on the merits, except that pages in the record were referred to.

The petitioner now insinuates, but does not openly charge, that the Court of Appeals in deciding the cause on February 25, acted unfairly, because the Commission was then engaged in "preparation of a brief on the merits", which was not completed until after the decision. But the Commission's case was fully before the Court of Appeals before decision. The so-called "brief on the merits" contained nothing that was not in the earlier briefs filed by the Commission. This sufficiently appears from the following, taken from the first two pages of the Commission's later brief, viz.:

> "This brief is in answer to the 'Brief for General Electric Company' filed on February 8, 1929, which in substance is the same as the brief on the merits previously filed by the same appellant on December 3, 1928 (the day on which oral argument commenced). It is unnecessary, therefore, to give any separate consideration to the first brief, and any mention of appellant's brief hereinafter made should be taken to mean the second brief.
>
> "Practically everything necessary to meet the contentions made in either brief will be found in the Commission's brief filed on December 1, 1928, but, in order to provide the Court with a convenient and more compact means of reference on the questions raised by appellant, we are filing this further brief."

Thus, there can be no fair attack upon the Court of Appeals upon the ground that its decision was rendered before it had a brief from the Commission, fully setting forth the latter's contentions.

On March 5 the Commission filed a petition for rehearing which was denied on March 9 (R. 393).

7. The decision on appeal:

The Court rendered its opinion on February 25, 1929 (R. p. 386). We have reviewed that opinion at pages 4, 5, *supra.*

Judgment was entered on the same day (R. 392).

The decision and judgment were based upon a consideration and review of the same evidence which was before the Commission.

The respondent, pursuant to the requirement of the Radio Act that it must file "notice in writing of said appeal and of the reasons therefor", had filed its notice of appeal and, as a part of its reasons therefor, filed its applications for renewal which had not been granted and matters pertaining thereto, *all of which was of record* with the Commission before appeal. Commission's brief, p. 41, is in error in stating that "General Electric Company injected a mass of 'additional evidence' into the record by attaching it to its notice of appeal". The Commission had all this evidence before it prior to the appeal.

The Commission filed a lengthy return to the notice of appeal (R. 23-48, 49-52 including numerous documents as exhibits, pages 54-201), in which it set up various matters concerning which the respondent had never been heard. But the Commission did not controvert any of the statements in the "notice of appeal and of the reasons therefor."

Further, as appears from the opinion of the Court of Appeals, that Court did not rely upon any matters not contained in the Commission's own "Return" to the appeal. The facts as to the history of WGY, the investment therein of the respondent, and the unique and important service rendered to more than a million listeners in Northern New York, Massachusetts, Vermont and New Hampshire are all contained in the application of January 14, 1928, which is a part of the Commission's "Return" (R. 89-95). The Commission did not, and made no attempt to, controvert those facts.

So, the Court of Appeals, in deciding that the WGY license should be renewed, had before it and acted upon precisely the same evidence that the Commission had acted upon in precisely the same matter.

A petition for rehearing was filed by the Commission in the Court of Appeals, and denied March 9, 1929 (R. 393).

Outline of Argument on the Merits.

1. The action of the Commission in refusing to renew the license for full time operation of WGY was a refusal of an application "for the renewal * * * of an existing license", within the meaning of the Radio Act; and the right to appeal to the Court of Appeals of the District came into existence under the terms of that Act.

2. The appeal was taken within the time specified in the Act.

3. The controversy did not become a moot one, by reason of the fact that, had the Commission granted the application and renewed the license for three months (to which licenses are limited under the terms of the Act), such renewed license would have expired before judgment was entered. The Court still had jurisdiction to review the Commission's order and enter judgment.

4. The Court of Appeals rightly decided that the Commission's refusal to grant the respondent's application for renewal of the WGY license for full time operation was unreasonable and was contrary to the public convenience, interest and necessity.

5. The Court of Appeals properly assessed costs.

6. Any other conclusion of the Court as to the unsoundness of the Commissioner's order would have resulted in the taking of the respondent's property right (for full time operation) without compensation.

ARGUMENT.

I. The Commission had refused the application for renewal.

The respondent's broadcasting station WGY had long been operating under a license for full time operation and serving a community which was not adequately served by any other station (see pp. 17-20, *supra*).

On January 14, October 6, October 23 and November 3, 1928 the respondent filed application for renewal of its license for full time operation (pp. 21, 22, 23, 26, *supra*).

The Commission offered to it only a limited license, that is, a license not permitting it to operate in the evening hours (see pp. 24, 25, *supra*) which are the most important hours for broadcasting service.

That, as a practical matter, this was tantamount to closing the station entirely, is made abundantly clear from the storm of protest which arose from individuals who were dependent upon WGY for broadcasting service (see letters R. 216-241), and from Chambers of Commerce (R. 248-264). The situation was so serious that the Attorney General of the State of New York, on behalf of the people of that State, filed an appeal from the decision of the Commission and that appeal was docketed (R. 10). Upon the hearing before the Court of Appeals, the Deputy Attorney General for New York was not allowed to argue, but was permitted to submit a brief, as was the Attorney General of the State of New Hampshire, as *amicus curiæ*.

The limited time license which the Commission offered differed so radically from that which the respondent had been enjoying and for the renewal of which it applied, and resulted in such a disastrous curtailment of service to the public, that it amounted to a refusal to renew. And so the Court of Appeals found, saying (R. 390):

> "The appellant rightly contends that the refusal of the Commission to renew its license except as modified with respect to the time of operation amounted to a refusal of a renewal within the sense of the Act of 1927."

Any other conclusion would mean that the Commission was left to be the sole and final judge of the requirements of the "public convenience, interest, and necessity." But it is clear that Congress intended and provided that the Commission should not be the final judge, Congress having provided for a review by the Court of Appeals.

The Commission asserts that giving WGY a part time license was "a granting and not a refusal of the renewal application" for full time operation, and, therefore, "not an appealable decision". Thus, according to the Commission's contention, an application for renewal of a full time license would be granted by issuing a license to operate one hour a day, as indeed was argued by Commission's counsel in the Court of Appeals.

Broadcasting stations may represent, as in the case of WGY, the expenditure of more than a million dollars, and the creation of extremely valuable good will. Communities have rights to adequate broadcasting service. Yet, if the contention of the Commission is sound, all these rights can be destroyed, without hearing or appeal.

That contention is unsound, and, the decision refusing renewal of WGY's full time license was appealable.

II. The Appeal was Timely.

The first paragraph of Sec. 16 of the Radio Act (p. 3, *supra*) provides, first, for an appeal from a refusal to *renew* a license and, second, following the semicolon, for an appeal from an order *revoking* a license. This latter portion of the paragraph requires that the appeal shall be filed "within twenty days after the decision complained of is effective." There is no similar provision in the first portion of the paragraph, which portion deals with refusals to renew a license.

If there be *no* time limit as to appeals from orders refusing to renew a license, then, of course, the present appeals were taken in time.

If the time limit specified for appeals from revocation of licenses is to be taken as applicable to appeals from refusals to renew a license, then the present appeals were likewise taken in time, as will appear from the following consideration of the dates.

The Commission states that its "decision" not to grant a full time license to WGY was made at a meeting of the Commission on October 12, 1928 (R. 44). A limited time license was issued or, rather, was dated as being issued, on October 17 (R. 188) but was not mailed to respondent until October 27 (R. 269) which, even as late as that date, was writing to know what, if any, license was to be issued (R. 186-7). The license which the Commission thus tendered to the respondent was a limited time license "for the term beginning November 11, 1928 and ending January 31, 1929" (R. 269). Therefore, October 27, 1928, the date of mailing the limited time license, or October 29, the date of its receipt, was the date of the refusal of the application for the full time license.

The respondent's first appeal was filed on November 9 (R. 1-10) which was about thirteen days from the date of refusal of the application.

But it was suggested that that appeal was premature in that the order was not to become effective until November 11, 1928 and that, according to the terms of the Radio Act, the appeal should be filed within twenty days "after the decision complained of is effective." So, to avoid any contention that the appeal was premature, the respondent filed the appeal of November 30 (R. 13-23). That was filed less than twenty days after November 11, the date when the order become effective.

The Court of Appeals held as to these two appeals (R. 390):

> "They present the same issues, and while the earlier appeals may have been premature, the last appeal conforms to the rules and is regular".

The appeal of November 30, 1928, was timely.

III. The Controversy did not become Moot.

The license under which WGY was operating, and of which it asked a renewal, was to expire on November 11, 1928. The March 28, 1928 amendment of the Radio Act provided (Appendix B, petitioner's brief p. 443, Sec 3) that no broadcasting license shall be renewed "for a period to exceed three months." So, if the Commission had renewed the WGY license, the renewed license would have expired not later than February 11, 1929.

The present appeals were taken on November 9 and 30, 1928. The appeals were argued on December 3 and 4. The record had not been printed at the time of the argument. The opinion of the Court was filed on February 25, 1929 and judgment was entered on that day. The whole proceeding had been conducted very expeditiously (though not hastily, for full opportunity for a complete presentation of the matter was afforded and utilized, but the opinion and judgment were not entered until after the license, had it been renewed by the Commission, would have expired, and would have been subject to further renewal.

If, under such circumstances, the Court of Appeals could not enter its judgment, on the theory that the controversy had become moot, the Commission, by issuing licenses for short terms could always preclude a testing of the propriety of its action. It is impossible to take an appeal, wait the twenty days allowed the Commission to file its return, print the record, prepare briefs, argue the case, and obtain a decision within a shorter time than two or three months. The provision of the Act, as to appeals, would become futile.

But the Commission's decision not to issue to WGY a renewal of its previously existing license was a fundamental one, expressive of a continuing policy. In *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission,* 219 U. S. 498, the Interstate Commerce Commission sought to dismiss

an appeal from one of its orders as moot upon the ground that the time fixed therein had expired. This Court denied the motion to dismiss saying (p. 515):

> "In the case at bar the order of the Commission may to some extent (the exact extent it is unnecessary to define) be the basis of further proceedings. But there is a broader consideration. The questions involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar) and their consideration ought not to be, as they might be, defeated, by short term orders, capable of repetition, yet evading review, and at one time the Government and at another time the carriers have their rights determined by the Commission without a chance of redress."

IV. The Judgment of the Court of Appeals was correct.

Within one hundred miles of WGY there is a population of approximately two million, four hundred thousand, including residents in Albany, Schenectady, Troy, Amsterdam, Utica, Poughkeepsie, Hudson, Saratoga, Rome, Kingston and Glens Falls in New York State, Pittsfield and Adams in Massachusetts, Rockland in Vermont, and many towns, villages and farms in the States of New York, Massachusetts, Vermont and New Hampshire. Because of the characteristics of this region, there are many institutions within this area devoted to the welfare of the afflicted and poor, such as the Disabled Veterans Hospital at Tupper Lake, New York; Albany Hospital for Incurables, Home for Aged at Schenectady, N. Y., and the hospitals, sanitariums, camps and convalescent homes in the Catskills, Adirondacks and Lake George regions.

This large and important community is nearly entirely dependent upon WGY for broadcasting service. For rea-

sons not entirely understood, in the present technical knowledge of radio, persons in this section cannot well receive from broadcasting stations located outside of that part of the country. The "convenience, interest and necessity" of that large body of the public cannot be overlooked.

The result of the discontinuance of service from WGY in the evenings would be disastrous to the convenience and interest of that large community to which the WGY service is a necessity, if it is to have radio service at all. And it is entitled to such service, and good service, as is every section of the country as a whole.

The Commission suggests that the respondent should arrange with station KGO (which is a station on the Pacific Coast owned by the respondent and to which the Commission has assigned full time operation on 790 kilocycles) to borrow, on behalf of WGY, some of the evening hours to which KGO is entitled. That is, the Commission has determined that KGO is, because of "public convenience, interest and necessity", entitled to full time operation, and still the Commission suggests that the public on the Pacific Coast shall give up the service to which it is entitled. Surely something better than that can be done. *Both* communities are entitled to service. The Court of Appeals dealt with this phase of the matter as follows (R. 302):

> "We have but little information concerning station KGO, except that it operates on a power of 10000 watts, and that it also is owned by the General Electric Company. It must be assumed that WGY operating in the evening with a power of 50000 watts would at certain distances interfere with the broadcasting of KGO, with its smaller power. It does not appear, however, that this interference would compare in point of public inconvenience with that resulting from the silencing of WGY after sunset at Oakland, nor that full time operation in the evening by WGY with 790 kilocycles would seriously impair the general scheme of allocation otherwise adopted by the Commission. We are convinced that the public convenience would be enhanced by granting full time to the latter station."

Again, the Commission suggests that the respondent should have filed an application for renewal of its WGY license for the use of other than 790 kilocycles, namely, for the use of some specified frequency which the Commission has assigned, for full time operation, to some other station in the First Zone in which WGY is located. That is, that the respondent should enter into a controversy with some other station. But it is the Commission, not some other station, which is doing what is complained of. It is the Commission, and not some other person or body, to which the respondent should look in order to obtain its rights.

Moreover, the Commission's action detrimental to the interests of those who are dependent upon WGY for their broadcasting service was wholly unnecessary. The Commission's stated difficulty in giving a full time operation, or "cleared channel" to WGY was based upon having only 40 cleared channels as a whole, 8 for each of the five zones. The Commission's own engineers recommended 50 cleared channels for high powered stations which would have meant 10 for each zone. If this recommendation had been adopted, the intent of Congress to secure a territorial division of station licenses could have been carried out without interfering with the service to the community which must rely upon WGY for service.

The report of the engineers of April 6, 1928 (R. 306) stated,

> "The fundamental change required to bring about any material improvement is to provide a considerable number of channels upon which only one station operates. The reason for this is a purely physical fact since heterodyne interference extends to many times the distance to which actual program service from a broadcasting station extends, operation of two or more stations on a channel results in an area of destructive interference much greater than the area in which program service is provided. Program service, free from interference can be furnished at great distances from a station only when the station has exclusive use of its channel."

The engineers accordingly recommended:

> "The number of channels (50) indicated for Class C stations is the minimum that should be provided in view of the far greater service, both distant and local, that will be rendered by such channels, owing to the absence of heterodyne interference and the consequent possibility of the use of greater power."

In the discussion of the proposal for a different form of allocation from that recommended by the engineers, Dr. Dellinger, of the Bureau of Standards, a Government bureau, and Chief Engineer for the Radio Commission, said (R. 336):

> "Perhaps the chief point of the engineers' recommendations which has been overlooked is the outstanding importance of providing not less than fifty exclusive channels, together with the fact that very much more power can be used on exclusive channels than on shared channels. It is only on exclusive channels that listeners at a distance can receive service. The rural population of the country will be heavily discriminated against unless a large number of exclusive channels are provided."

In his testimony before the Radio Commission, Mr. J. V. L. Hogan, an eminent radio engineer, and also a consultant of the Commission, said (R. 355):

> "The areas that may be served by high powered stations operating on clear channels when compared with the areas served by numerous stations of low power operating on one channel shows the use of clear channels to be more economical. If fifty stations of the power of 100 watts are scattered throughout the country on a single channel, each being 200 miles removed from any other station, an area of approximately 35,000 square miles will receive service from the entire number. A 5000-watt station on a clear channel will serve an area of 500,000 square miles with a signal of one-half of an intensity unit, thus permitting a better average grade of service than that rendered by the 100-watt stations.

"This illustration furnishes a sound basis for the conclusion that every channel assigned to many small stations results in useless loss of service to many people."

Dr. Dellinger also testified (R. 359):

"A greater area is served by one 50,000-watt station than by the aggregate number of small stations with the same total power."

There is, and can be, no dispute as to the correctness of these statements. High-powered stations, operating full-time upon cleared channels, can furnish better quality service, to remote listeners, than any other system. *It is undisputed that WGY is such a station as should have a cleared channel for evening operation.* Thus, the answer of the Commission states (R. 45):

"Appellant's station is of such a character with respect to power capacity, and the region desired to be served by it is of such extent, that it can be accommodated only on a cleared channel".

As Commissioner O. H. Caldwell, appointed to represent the First Zone, wrote to the respondent under date of October 17, 1928, in a letter put in evidence by the Commission (R. 162, 163):

"Answer to your letter of last week has been delayed by the pressure of the Commission's hearings and other work and my own desire to report to you as fully as possible the results of my continuing efforts to secure an increase in the number of clear channels for each Zone, so that WGY might have a full-time assignment on one of these.

"Certainly I sympathize with the desire of yourself and my many good friends in the General Electric Company to have a separate, exclusive channel for WGY, and it is my view that the Commission has made a grave mistake in not providing ample clear channels to take

care of WGY in this manner. I consistently maintained this throughout the Commission's deliberation, pending the adoption of a plan, and *have always urged the use of fifty clear channels as all the engineers unanimously advised.*

"Some of the Commissioners, however, wanted 25, one none, and it was by the barest chance, after weeks of argument, that we were able to get forty approved.

"Since talking with you and receiving your letter I have again had this matter of an additional clear channel for Zone One before the Commission several times, in your behalf. Such a reassignment, I believe, would be in the public interest by enabling many more listeners to be served, than can ever be reached by the small stations on such channels. It would also enable us to solve some very difficult situations in the Fourth Zone. At present, it seems impossible to get a Commission majority to approve such a proposal of even forty-five clear channels (one additional for each Zone), but *I believe that some of my political-minded associates are beginning to realize the soundness of engineering advice* and that an accord of 45 clear channels may later be readily reached. In fact, I am hoping that the full fifty clear channels, (two additional per zone) may be available by next June, so that WBAL, Baltimore, may continue full time when WTIC's new 50,000 transmitter is completed.

"As the public learns that it is better served by one great station like WGY, than by the two or three 500 watt stations which consume the same wave length, and this realization is brought to members of Congress, (who have heretofore generally *opposed* large stations and as many exclusive channels as the engineers want) the other members of the Commission will undoubtedly reverse their views into favoring the large stations as the instruments of greatest public service."

No sound reason appears why Mr. Caldwell's "political-minded associates" should have disregarded the reports and recommendations of their own engineers. If these reports and recommendations had been followed, broadcasting reception in the United States would have been improved in a

scientific and definite way, and at the same time the community dependent upon WGY could be served.

The Commission's brief, p. 97, attempts to support the choice of 40 cleared channels, by reference to some communications and memoranda sent to the Commission by others than the respondent, which was never given a hearing on the issue of how many cleared channels should be employed. But, the fact is clear that the Commission could have complied with every provision of the Radio Act, and the Davis amendment, by providing 50 clear channels as recommended by its engineers. The Commission's apparent desire to allow some low powered stations to operate (not in the WGY area), can not excuse its attempted closing down of WGY during evening hours.

We submit that the Court of Appeals was amply justified, and was right, in directing that the respondent was entitled to the renewal of its license for full time operation.

V. The Court of Appeals properly assessed costs.

Section 16 of the Radio Act is silent as to costs on appeals to the Court of Appeals.

Congress, in vesting jurisdiction in the Court of Appeals to consider applications for broadcasting licenses, necessarily gave that Court authority to proceed in accordance with its rules (see p. 14, *supra*).

Costs are discretionary, and it was entirely proper for the Court of Appeals to assess the costs against the Commission.

VI. The Property Right to Operate WGY as a Full Time Station.

It was urged, in the Court of Appeals, as one reason why the order of the Commission should be set aside, that the order would wrongfully deprive the respondent of its property rights to full time operation of station WGY.

The Court of Appeals mentioned, but did not find it necessary to base its decision on, this point (R. 300-301).

This Court may not wish to consider the matter of the property right unless it holds that it has jurisdiction of the case (as we do not believe it has, for the reasons above expressed) and, having that jurisdiction, decides that the Commission was right and the Court of Appeals was wrong in determining that the renewal of the WGY full time license would not serve the "public interest, convenience, or necessity".

In the event, however, that this Court may desire to inquire into the property right, we present it here.

We believe that this Court has not heretofore had before it the matter of property rights in a radio broadcasting station, its operation on full time, etc. Such property rights have been discussed in the following cases:

White v. *Federal Radio Commission et al.*, 29 Fed. 2nd 113, 114 (Dist. Ct. N. D. Ill.).

United States v. *American Bond and Mortgage Co.*, 31 Fed. 2nd 448, 455-456 (Dist. Ct. N. D. Ill.).

City of New York v. *Federal Radio Corporation*, U. S. Daily, Nov. 6, 1929, p. 2226 (Ct. of App. D. C.).

Technical Radio Laboratories v. *Federal Radio Commission*, U. S. Daily, Nov. 7, 1929, p. 2242 (Ct. of App. D. C.).

1. *The facts upon which the right is based:*

As we have heretofore pointed out, WGY is one of the oldest broadcasting stations in the United States, there being only nine stations which have a longer period of service.

It has been broadcasting on full time operation ever since May 21, 1923 and has been efficiently serving a large community which must rely upon it alone for service, as that community is so located that it cannot get good reception from any other station.

The station represents an investment of over one and a half million dollars. Such an investment was not made, and could not be made, except in reliance upon a right to continue to give the service for which it was installed.

Then the Radio Commission, established in 1927, attempts, after WGY has been in full time operation for more than four years, to take away from it the right to broadcast during the evening hours, the most valuable time for broadcasting.

And, it should be particularly noted that the Commission does not take the full time operation away from WGY because such operation is against the public interest, convenience or necessity, but in order to give such full time operation to some other station, in the First Zone, which has come later in the field.

And it should further be noted that the Commission has made no showing that the ones to whom full time operation on cleared channels have been given are better entitled to them than is WGY from whom a cleared channel has been taken, nor that such other stations can better serve the public interest, convenience or necessity (No such showing could be made, p. 34, *supra*).

The issue is not whether the Commission could validly regulate the use by WGY of its broadcasting operations. The respondent in this cause has not questioned, and does not now question, the right of the Commission to regulate broadcasting, including the right to allot to WGY any channel or frequency other than, but equivalent to, 790 kilocycles. But, the respondent does deny the right of the Commission to prevent WGY operating, wholly or partially.

2. The legal principles:

The legal principles applicable to the facts under consideration are not novel, although their application may be. In *Buchanan* v. *Warley,* 245 U. S. 60, 74, it is said:

> "Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, *use* and dispose of it. The Constitution protects these essential attributes of property".

When the respondent established WGY, now the tenth broadcasting station in the United States, it owed a duty to operate this station in such a way as not to interfere with the right of the other stations, which had been previously established, to use such stations practically, that is, free from the interference of any electrical impulse generated by the respondent at WGY. Similarly, subsequently established stations are under a duty so to use their stations without interfering with WGY. Priority of time as against any subsequent station gives to the respondent superiority of right to be free from interference caused by subsequently established stations. And this, in our view, is a property right.

The superior right of the first appropriator of water in the western states has been eloquently described by Mr. Justice Field in *Jennison* v. *Kirk,* 98 U. S. 453, at p. 457.

Again, this Court declared in *Atchison* v. *Peterson,* 20 Wall. 507, with respect to the rights of the first appropriator of water (p. 512):

> "And he who first connects his own labor with property thus situated and open to general exploration, does, in natural justice, acquire a better right to its use and enjoyment than others who have not given such labor."

The same rule of priority of appropriation is applied in trade-mark cases. In *Hanover Milling Co.* v. *Metcalf,* 240 U. S. 403, it is said (p. 415):

> "Expressions are found in many of the cases to the effect that the exclusive right to the use of a trade-mark is founded on priority of appropriation. Thus, in *Canal Co.* v. *Clark,* 13 Wall. 311, 323, reference is

made to 'the first appropriator'; in *McLean* v. *Fleming*, 96 U. S. 245, 251, to 'the person who first adopted the stamp'; in *Manufacturing Co.* v. *Trainer*, 101 U. S. 51, 53, the expression is 'any symbol or device, not previously appropriated, which will distinguish,' etc. But these expressions are to be understood in their application to the facts of the cases decided. In the ordinary case of parties competing under the same mark in the same market, it is correct to say that prior appropriation settles the question, * * *"

And, in determining the respective rights of public utility companies operating in the same field, priority of time gives superiority of right. In *Los Angeles Gas & Electric Co.* v. *City of Los Angeles*, 241 Fed. 912, affirmed 251 U. S. 32, the City of Los Angeles by ordinance attempted to compel a public utility occupying the streets of Los Angeles to relocate its poles and lamps and apparatus in order to make room for a municipal lighting system. The District Court said (pp. 919-920):

"When, however, pursuant to the terms of its lawful franchise, it has established its poles and wires and other instrumentalities in the public streets, it may lawfully and properly object to being compelled to remove or relocate them in order that another company, a competitor of later origin and right coming in, may take their place and thereby be enabled to carry on its own intended business. In other words, in this as in many other relations, first in time is first in right, and superiority of right consequent upon being first in time may not be nullified by even necessary requirements of a competitor or other utility later in time and therefore inferior in right. (Citing cases.) In 200 Pa. 209, 219, 49 Atl. 766, 767, 86 Am. St. Rep. 712, the Supreme Court of Pennsylvania said:

"'As between two corporations exercising similar franchises upon the same streets, priority carries superiority of right. Equity will adjust the conflicting interests as far as possible and control both so that each company may exercise its own franchises as fully as is compatible with the necessary exercise of the other's. But, if limitation or interference of one

or the other are unavoidable, the later must give way, and the fact that it is under contract with the city for work of a public nature does not alter its position, or give it any claim to preference.'

This Court in affirming the judgment said, 251 U. S. 40:

"It will be observed that we are not concerned with the duty of the corporation operating a public utility to yield uncompensated obedience to a police measure adopted for the protection of the public, but with a proposed uncompensated taking or disturbance of what belongs to one lighting system in order to make way for another."

That is exactly the situation presented by the order of the Commission. The Commission required respondent to operate its station at WGY during the daytime only, in order that some other station located elsewhere in the United States may be free from the interference of station WGY at night.

This is nothing short of taking the property of the respondent and giving it to another.

In a recent book on The Law of Radio Communication, by Judge Stephen Davis, formerly Solicitor of the Department of Commerce, these general principles are referred to and it is said (p. 131):

"As applied to broadcasting stations prior to the exertion of regulatory authority under the Radio Act of 1927, it must be concluded that the courts would protect the one first in the field as against interference from a newcomer, in spite of the novelty of the situation. For while the specific condition was new, the general principle was old and well established. It furnished the only basis for determination. It must be remembered that the builder of the last station was not confined to any particular locality nor to any particular wave-length. Under the 1912 law, he might choose both location and channel at his will, having regard only to the conditions of his neighbors. If he finds that wave-lengths available for use in a certain locality are all appropriated by others, that is the penalty he pays for being late."

The right of the respondent to maintain its broadcasting station WGY on a cleared channel was firmly established prior to the Radio Act of 1927. The right to be free from interference from subsequently established stations was a property right which gave value to the investment in the station and equipment at WGY. To deprive respondent of the right to use this property is to deprive it of the property itself.

Congress under the interstate commerce clause of the Constitution may perhaps regulate the use of the ether by broadcasting stations. Respondent does not here question such regulatory power. If the Radio Commission had desired to assign to it a frequency other than 790 kilocycles so that it might operate its station equally as well as on such frequency, respondent would have accepted such assignment; and it notified the Commission that it would do so. The issue here is not as to frequency, but as to the right to operate. And, the power to regulate does not include the power to destroy the property of the respondent, in order to build up the property of someone else. In the *Los Angeles* case (*supra*) the City of Los Angeles had the power to regulate the location of poles and lamps. But, it could not constitutionally exercise this power to require one electric light company to make room for another.

3. *The prohibition of the use of Station WGY is a taking of the property in violation of the Fifth Amendment of the Constitution.*

The United States Government does not own the ether. It has no proprietary rights to the ether, which entitle it to grant licenses to some and refuse licenses to others. If the ether is susceptible of ownership at all, as between the United States Government and the States, it belongs to the States, just as the bed and waters of navigable streams belong to the States and not to the Federal Government. *Smith* v. *Maryland,* 18 How. 71, 74; *Mumford* v. *Wardwell,* 6 Wall. 423; *Weber* v. *Harbor Commissioners,* 18 Wall. 57, 66.

As a matter of fact, as said in Commission's brief, p. 148, "The ether is an hypothetical medium. There is no satisfactory definition of it. It is not even known to exist."

The power of Congress to regulate broadcasting is derived from the power to regulate interstate and foreign commerce. This power is the power "to prescribe the rule by which commerce is to be governed". *Gibbons* v. *Ogden,* 9 Wheat. 1.

In *Hammer* v. *Dagenhart,* 247 U. S. 251, 269-270, this power was defined as follows:

> "In other words, the power is one to control the means by which commerce is carried on, which is directly the contrary of the assumed right to forbid commerce from moving and thus destroy it as to particular commodities."

In that case it was held that Congress had no power to prohibit products of child labor from moving in interstate commerce. Decisions such as *Champion* v. *Ames,* 188 U. S. 321 (lottery tickets); *Hipolite Egg Co.* v. *United States,* 220 U. S. 45 (pure food); *Hoke* v. *United States,* 227 U. S. 308 (white slave traffic act) and *Clark Distilling Co.* v. *Western Maryland Ry. Co.,* 242 U. S. 311 (intoxicating liquors) were declared to be based "upon the character of the particular subjects dealt with" and it was held with respect to the Federal Child Labor Act (pp. 271-272):

> "The act in its effect does not regulate transportation among the States, but aims to standardize the ages at which children may be employed in mining and manufacturing within the States."

An attempt was made to sustain the Act in that case upon the ground that the States which permitted child labor were given an unfair advantage over the States which prohibited it. As to this contention, the Court said (p. 273):

> "There is no power vested in Congress to require the States to exercise their police power so as to prevent possible unfair competition. Many causes may co-

operate to give one State, by reason of local laws or conditions, an economic advantage over others. The commerce clause was not intended to give to Congress a general authority to equalize such conditions."

The order of the Radio Commission did not attempt to regulate whatever interstate commerce the respondent is engaged in. The purpose of the order was not to regulate the radio waves generated at WGY, but to prevent them.

The aim of the Commission was to prohibit interstate commerce between WGY and its radio public, so as to encourage interstate commerce between some other station and its public.

The station of the respondent at WGY is useful for only one purpose. To deprive the company of the right to use this station for that purpose is to render the property useless for any purpose. In this respect a broadcasting station differs from other property, the use of which has often been regulated by legislation. Zoning laws, for instance, prohibit the owner of property from using it for certain purposes, but all other purposes for which the property can be used are left open. Here, however, the property is available for only one use, and if that use is prohibited, there is as effective a taking of the property as if title should be acquired.

The Commission's order assumed to be a permanent direction to respondent not to operate its station during the only periods when the station can be operated to advantage. It attempted to reduce station WGY from the eminent position which it has achieved to a subordinate position. It cut respondent off from the ability to secure programs of the highest quality from advertisers and thus immediately and directly affects the programs furnished by WGY not only to listeners in the United States, but also through its affiliated short wave transmission stations to its radio public in foreign countries.

In Davis on the Law of Radio it was recognized that if the Radio Commission should attempt to revoke the licenses

of any existing radio stations serious constitutional questions would be presented. Judge Davis said, page 65:

> "If the commission, however, should refuse to issue a license to the owner of apparatus constructed and operating prior to the passage of the law, the question of the constitutional rights of the owner may easily arise. The owner may contend either that he is deprived of his prop erty without due process of law, or that his property is taken for public use without just compensation, in either case in violation of the Fifth Amendment to the Federal Constitution."

In *Pumpelly* v. *Green Bay Company*, 13 Wall. 166, a property owner's land was flooded as a result of the erection of a dam authorized by the State of Wisconsin and by the United States. The Constitution of Wisconsin provided that "the property of no person shall be taken for public use without just compensation therefor." It was contended that there was no taking of the land within the meaning of the constitional provision and that the damage sustained was merely a consequential result of the use of a navigable stream for the improvement of navigation. This Court answered this contention, saying (pp. 177, 178):

> "It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen,

> as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors."

In *United States* v. *Lynah,* 188 U. S. 445, the United States constructed a dam in a navigable river and thereby raised the level of the river so as to take away the possibility of drainage from nearby land used as a rice plantation. This Court held that there had been a taking of the property within the scope of the Fifth Amendment, declaring (p. 470):

> "It is clear from these authorities that where the government by the construction of a dam or other public works so floods lands belonging to an individual as to substantially destroy their value, there is taking within the scope of the Fifth Amendment. While the government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done it is of little consequence in whom the fee may be vested."

Again, in *United States* v. *Cress,* 243 U. S. 316, where the Federal Government has raised water by the construction of a dam above its normal level so as to subject land permanently to periodical overflows substantially injuring though not destroying their value, it was held that there had been a partial taking of the property for which compensation was required.

In none of these cases was title to the land taken. In all of them the owner was held entitled to compensation because he had been deprived of its use. The deprivation of the use of the property was held a taking of the property. It is true that in other cases, it has been held that recovery cannot be had for consequential damages caused by an improvement made by Congress in the exercise of its power over navigable streams. But, while property is held subject to

the paramount power of Congress to make such improvements in the interest of navigation (*Union Bridge Co.* v. *United States,* 204 U. S. 364; *Greenleaf Lumber Co.* v. *Garrison,* 237 U. S. 251), it is none the less true that such an invasion of property as constitutes a substantial deprivation of its beneficial use is a taking for which compensation must be made.

The property of the respondent at WGY may possibly be said to have been acquired with knowledge that Congress might regulate whatever interstate commerce respondent was engaged in. But respondent did not acquire its property subject to the possibility that under the guise of a regulation of interstate commerce, an attempt would be made to prevent the efficient use of its property, in order that another might use it.

The power of Congress to enact reasonable regulations to foster and promote interstate commerce is no greater than the police power of the state to enact reasonable laws for the promotion of public health, safety and welfare. Yet in *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S. 393, a statute of the State of Pennsylvania forbidding the mining of coal in a certain manner, this Court said was unconstitutional as applied to a coal mining company that had previously acquired rights that were interfered with by the statute.

> "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. *But obviously the implied limitation must have its limits, or the contract and due process clauses are gone.* One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts" (p. 413).
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> * * * * * *
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> "To make it commercially impracticable to mine certain coal has very nearly the same effect for constitu-

tional purposes as appropriating or destroying it. This we think that we are warranted in assuming that the statute does" (pp. 414-415).

* * * * * *

"The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking * * *" (p. 415).

The same principle was recently reaffirmed in *Delaware, Lackawanna & Western R. R. Co.* v. *Morristown*, 276 U. S. 182, where it was held that the police power of the State did not authorize the using of railroad station grounds for a public hack stand (p. 193):

"But, assuming that under the circumstances the creation of the public hack stand would be a proper exertion of the police power, it does not follow that the due process clause of the Fourteenth Amendment would not safeguard to the owner just compensation for the use of its property. *Penna. Coal Co.* v. *Mahon*, 260 U. S. 393, 416. The police power may be and frequently it is exerted to effect a purpose or consummate an enterprise in the public interest that requires the taking of private property; but, whatever the purpose or the means employed to accomplish it, the owner is entitled to compensation for what is taken from him. The railroad grounds, station, platforms, driveways, etc., are used by the petitioner for the purposes of its business as a common carrier; and, while that business is subject to regulation in the public interest, the property used belongs to petitioner. The State may not require it to be used in that business, or take it for another public use, without just compensation, for that would contravene the due process clause of the Fourteenth Amendment."

The property of the respondent in station WGY, created, developed and in full use before the Radio Act of 1927, can not be destroyed by the Commission.

4. *The Radio Act does not authorize the Commission to destroy the property of respondent in WGY.*

The Federal Radio Commission was established by the Radio Act of 1927.

Prior to this Act, licenses to operate broadcasting stations had been issued by the Secretary of Commerce under the Act of Congress of August 13, 1912, 37 Stat. 302. This Act, as held in *Hoover* v. *Inter City Radio Company*, 286 Fed. (Ct. of App., D. C.) 1003, gave no discretion to the Secretary of Commerce to refuse licenses. In *United States* v. *Zenith Radio Corporation*, 12 Fed. (2d) 614, (D. C. Ill.), it was held that the operation of a radio station upon a wave length other than the one assigned in the license did not subject the company so operating the station to the penalties provided by the Act of 1912, which was thus ineffectual to prevent the erection of new broadcasting stations or to prevent interference between existing stations. President Coolidge, in his annual message to Congress in December, 1926, urged that further legislation should be speedily enacted. (Congressional Record, Vol. 68, Part I, p. 32).

On December 8, 1926, a joint resolution was passed as a stop gap until adequate legislation could be framed, providing in effect that no original license for the operation of any radio broadcasting station and no renewal of a license of an existing broadcasting station should be granted for longer periods than 90 days (44 Stat. 917). The resolution further provided:

> "* * * no original radio license or the renewal of an existing license should be granted after the date of the passage of this resolution unless the applicant therefor shall execute in writing a waiver of any right or of any claim to any right, as against the United States, *to any wave length* or to the use of the ether in radio transmission because of previous license to use the same or because of the use thereof."

The debates in Congress which may be looked to, not for the purpose of construing any particular provision, but for the purpose of ascertaining the general situation which Congress had in mind and with reference to which Congress legislated (*Ozawa* v. *U. S.*, 260 U. S. 178, 194; *U. S.* v. *Katz*, 271 U. S. 354, 357) indicate that there was no intention on the part of Congress to authorize the Commission to de-

prive stations of their vested property rights. Congress intended to authorize the Commission to regulate the operation of stations, with respect to particular frequencies, etc., as is clear from the words of the Radio Act (see Congressional Record, Vol. 68, Part III, p. 3027). Part of the controversy in Congress hinged upon the provision now found in Section 5 of the Radio Act of 1927, as follows:

> "No station license shall be granted by the Commission or the Secretary of Commerce until the applicant therefor shall have signed a waiver of any claim to the use of *any particular frequency or wave length* or of the ether *as against the regulatory power of the United States* because of the previous use of the same, whether by license or otherwise."

This, it will be noted, is limited to the waiver of the right to a particular frequency as distinguished from the general waiver referred to in the joint resolution of December 8, 1926.

Senator Dill, who was in charge of the conference report in the Senate (Congressional Record, Vol. 68, p. 2588), was asked with respect to this provision (*id.* pp. 2869, 2870):

> "MR. HOWELL. Mr. President, I would like to ask why the words 'regulatory power of Congress' were inserted there. There are two theories respecting the authority of the Government in connection with the use of the ether. One is that the ether belongs to the people of the country, and that it is not to be acquired by anyone. The other theory is that the right to use the ether is a vested right when acquired, and then the Government merely has the right to regulate the use thereof.
>
> "This language indicates that this latter theory is adopted in this radio bill. It was not the theory when the bill passed the Senate.
>
> "MR. DILL. In reply to the Senator's question, I may say that the temporary resolution passed in the closing days of the last session provided that the waiver should be as against the United States instead of as against the regulatory powers of the United States.
>
> "When those waivers were asked for we found that attorneys for the various applicants insisted that that

waiver provision was unconstitutional because it was so broad that it required, in the waiving of all rights as against the United States, the waiving even of the right of due process of law in the taking of their apparatus. They believed that it would require them to waive rights that they might have as against the other users of radio apparatus and insisted that the only power the Congress had over radio was the power to regulate interstate commerce, and that it got its power from the commerce clause alone.

"The Government does not own the frequencies, as we call them, or the use of frequencies. It only possesses the right to regulate the apparatus, and that right is obtained from the provision of the Constitution which gives Congress the power to regulate interstate commerce.

"The conferees thought that it was better to have a waiver that was sufficiently clear in its terms to shut off any claim as against the power of the United States to control stations, and have that waiver constitutional, than to hold to a waiver of doubtful constitutionality, which would probably be overturned by the courts, and we would have no waiver whatever in existence.

"It was for that reason that the conferees agreed on the waiver herein provided."

The proceedings in Congress agree with the clear wording of the Radio Act, which is manifestly a regulatory statute.

Section 1 of the Act prohibited the use or operation of any apparatus for radio transmission in interstate or foreign commerce without a license.

Section 2 of the Act divided the United States into five zones.

Section 9 of the Act provided for the issuance of licenses and, as passed and before its amendment by Act of Congress of March 28, 1928, provided as follows, 44 Stat., Vol. 2, p. 1166:

"The licensing authority, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.

"In considering applications for licenses and renewals of licenses, when and in so far as there is a demand for the same, the licensing authority shall make such a distribution of licenses, bands of frequency of wave lengths, periods of time for operation, and of power among the different States and communities as to give fair, efficient, and equitable radio service to each of the same."

The provision of this Act authorizing the Commission to issue licenses in accordance with the principles of necessity and convenience unembarrassed by restrictive provisions was continued in force only for one year. By Act of Congress on March 28, 1928, 45 Stat. 373, the second paragraph of Section 9 of the Radio Act of 1927 above quoted was amended to read as follows:

"It is hereby declared that the people of all the zones established by section 2 of this Act are entitled to equality of radio broadcasting service, both of transmission and of reception, and in order to provide said equality the licensing authority shall *as nearly as possible* make and maintain an equal allocation of broadcasting licenses, of bands of frequency or wave lengths, of periods of time for operation, and of station power, to each of said zones when and in so far as there are applications therefor; and shall make a fair and equitable allocation of licenses, wave lengths, time for operation, and station power to each of the States, the District of Columbia, the Territories and possessions of the United States within each zone, according to population. The licensing authority shall carry into effect the equality of broadcasting service hereinbefore directed, whenever necessary or proper, by granting or refusing licenses or renewals of licenses, by changing periods of time for operation, and by increasing or decreasing station power, when applications are made for licenses or renewals of licenses: *Provided,* That if and when there is a lack of applications from any zone for the proportionate share of licenses, wave lengths, time of operation, or station power to which such zone is entitled, the licensing authority may issue licenses for the balance of the proportion not applied for from any zone, to applicants from other zones for a temporary period of ninety days each, and

> shall specifically designate that said apportionment is only for said temporary period. Allocations shall be charged to the State, District, Territory, or possession wherein the studio of the station is located and not where the transmitter is located."

This amended act made it mandatory upon the Commission "as nearly as possible" not only to provide listeners in all parts of the United States with equal radio service but also to allocate transmitting stations equally among the zones and in accordance with population. It does not state, and it could not have been intended by Congress, that the Commission should destroy the property of the stations which had previously been constructed.

In reporting the bill to the House, proposing the equal allocation of each of the five zones of broadcasting licenses, Mr. White, as Chairman of the House Committee on Merchant Marine and Fisheries, said (Congressional Record, House Report No. 800):

> "The equality here sought is not an exact mathematical division. That may be physically impossible. The language does not contemplate the withdrawal of station licenses, of power and wave lengths from others, and an impounding thereof in the absence of application from the third or other zones therefor. It does not suggest that the requirement of the law of a showing of public interest, convenience or necessity as the basis for the grant of a license, or that other provisions of the law, are to be waived."

5. *The Radio Act gives only to the President the power to close stations, and then only upon just compensation.*

The Radio Act of 1927 grants to the Commission only the power to regulate stations (Sec. 4), not to close them. The only power to close stations is given to the President, in case of war or other national emergency, and then, only "upon just compensation to the owners" (Sec. 6 and 7).

The Radio Act, when read as a whole, does not support the Commission's contention that Congress intended to give

it power to close stations without just compensation. When Sections 4, 6 and 7 are read together, it is entirely clear that Congress gave to the Commission only the power to regulate, and that the power to close was given only to the President, and only in cases of national emergencies and only "upon just compensation".

In cases of national emergency, the police power of the United States may properly be exercised to take private property for public use, including the closing of broadcasting stations, wholly or partially. Even if investments of millions of dollars have been made, even if the businesses originated, developed and carried on are extremely valuable, Congress may still authorize their destruction, under certain *extraordinary* conditions, and *upon* just compensation.

By the Radio Act, Congress gave power to the President to close stations, in national emergencies, upon paying just compensation. No power was given to the Radio Commission to close stations, even upon just compensation.

If the Commission had the power to close stations (without a hearing and without an appeal), a specific grant to the President of such power in national emergencies and upon just compensation would be meaningless.

Congress did not intend to authorize the Radio Commission to destroy the property of great stations like WGY, in order to bring about an interference-free country with a mathematical equality of broadcasting licenses among zones. And, if this were the purpose of Congress, it cannot be constitutionally accomplished without providing just compensation for the property rights taken.

Conclusion.

1. This Court does not have jurisdiction to review the action of the Court of Appeals in deciding that the WGY license should be renewed, because such action was administrative, and not judicial.

2. The action of the Court of Appeals was correct, because the closing down of WGY during the evening hours would not serve public interest, convenience or necessity and, moreover, would destroy the property rights in WGY.

Respectfully submitted,

CHARLES NEAVE,
STEPHEN H. PHILBIN,
JOHN W. GUIDER,
Counsel for General Electric Company.

December, 1929.

FILE COPY

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CHARLES ELMORE

No. 122.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

FEDERAL RADIO COMMISSION, *Petitioner*,

v.

GENERAL ELECTRIC COMPANY and PEOPLE OF THE STATE OF NEW YORK, *Respondents*.

On Writ of Certiorari to the Court of Appeals of the District of Columbia.

BRIEF FOR THE PEOPLE OF THE STATE OF NEW YORK.

HAMILTON WARD,
Attorney General.

CLAUDE T. DAWES,
Solicitor General.
HENRY S. MANLEY,
Assistant Attorney General.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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FEDERAL RADIO COMMISSION, *Petitioner*,

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BRIEF FOR THE PEOPLE OF THE STATE OF NEW YORK.

Statement.

No formal statement of facts, additional to that made in the brief for the petitioner and the brief for General Electric Company, appears to be necessary.

Summary of Argument.

Argument will be made under four point headings, as follows:

I. The Court lacks jurisdiction of the present proceedings.

II. The State of New York is a party in interest, entitled to appeal.

III. The limited license issued to Station WGY at Schenectady, N. Y., would not give the broadcasting service which public convenience, interest or necessity requires.

IV. The limited license issued to Station WGY would not carry into effect the equality of radio broadcasting service which the people of the State of New York and the First Zone are entitled to under the provisions of the Federal Radio Act.

POINT I.

The Court lacks jurisdiction of the present proceedings.

Under this point we rely upon the argument addressed to the same topic in the brief of General Electric Company.

Relative to the matter of costs, said on page 42 of petitioner's brief to have been awarded by the Court of Appeals in favor of the State and against the Commission, we have no knowledge of them (except R. 393), little interest in them, and do not see how that award, particularly if it be wrong, as petitioner says it is, can establish the judicial character of the function of the Court of Appeals, as suggested at page 8 of petitioner's brief, and thus affect the jurisdiction of this Court.

POINT II.

The State of New York is a party in interest, entitled to appeal.

1. *If the Act means anything else, then its phrasing is neither clear nor usual.*

Section 5 of the Radio Act of 1927 (44-2 Stat. 1165; petitioner's brief, 120) provides as follows:

> "Any person, firm, company or corporation, any State or political division thereof aggrieved or whose interests are adversely affected by any decision, determination, or regulation of the Secretary of Commerce may appeal therefrom to the commission by filing with the Secretary of Commerce notice of such appeal within thirty days after such decision or determination or promulgation of such regulation. All papers, documents and other records pertaining to such application on file with the Secretary shall thereupon be transferred by him to the commission. The commission shall hear such appeal *de novo* under such rules and regulations as it may determine.
>
> Decisions by the commission as to matters so appealed and as to all other matters over which it has jurisdiction shall be final, subject to the right of appeal herein given."

The only "right of appeal herein given", is that given by §16:

> "Any applicant for a construction permit, for a station license, or for the renewal or modification of an existing station license whose application is refused by the licensing authority shall have the right to appeal from said decision to the Court of Appeals of the District of Columbia; and any licensee whose license is revoked by the commission shall have the right to appeal from such decision of revocation to said Court of Appeals of the District of Columbia or to the

district court of the United States in which the apparatus licensed is operated * * *"

Does the provision in §5, that decisions of the Commission, in all the cases and affecting all the possible parties enumerated:

"shall be final, *subject to* the right of appeal herein given"

mean the same as though Congress had said that the decisions of the Commission, in all those cases, and affecting all those parties:

"shall be final, *except as* the right of appeal is herein given" [in two classes of cases, and to certain parties, only].

Certainly, if the latter phrasing correctly presents the meaning of the statute, then the phrasing actually used, is neither clear nor usual. The phrase "subject to", usually is employed to signify a general subordination to some incident. Where the incident is exceptional, it is appropriately introduced by the phrase, "except as".*

---

* Section 10 of the Grain Futures Act (44-1 Stat. 89) provides as follows: "In proceedings under sections 8 and 9 of this chapter the judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 347 of Title 28, Judicial Code and Judiciary." Almost identical provisions are found in the Revenue Act of 1926, sec. 1226 (44-1 Stat. 2019); the Federal Trade Commission Act, sec. 45 (357); the Customs Duties Law, sec. 176 (579); the Monopolies Act, sec. 21 (355); and the Packers and Stockyards Act, sec. 194-h (103). See also, for somewhat similar provisions: Trade-Marks Law, sec. 98 (365); and Copyrights Act, sec. 28 (454).
Section 76 of the Grain Futures Act (44-1 Stat. 92) provides that certain shipments are "subject to the right of either party to the transaction to refer any dispute as to the grade of the grain to the Secretary of Agriculture," etc. The phrase, "subject to review", is used in sections 288-c, 309, 347-c, 349, 350, 463-a, and 463-b of the present Judicial Code. Finance Law, sec. 806 (44-1 Stat. 1030) makes certain authorizations, "subject to the approval of the President." Transportation Law, sec. 17-4 (1466) makes certain orders, "subject to rehearing", as provided in a specific section.
Section 176 of the Customs Duties Law (44-1 Stat. 579) provides as follows, relative to findings of the Tariff Commission: "Such findings, if supported by evidence, shall be conclusive, except that a rehearing may be granted by the commission, and except that * * * an appeal may be taken from such findings upon a question or questions of law only to the United States Court of Customs Appeals by the importer or consignee of such articles." See also, sec. 399 of same law (44-1 Stat. 595). The word, "unless", is frequently used to introduce an exceptional incident; see Customs Duties Law, sec. 381 (44-1 Stat. 593); also sec. 402 (596); Revenue Act of 1924, sec. 1217 (847); Judicial Code, sec. 466. The phrase, "provided, however", is sometimes used in a similar sense; see Judicial Code, sec. 308.

2. *The Act conceives of a State as a party interested in radio licensing.*

The reasons which led up to the Act, being recalled, it is clear that the Act is principally concerned to safeguard the interests of *listeners*. The audience to radio broadcasting, unseen, impossible to identify, but all-important, is a party always to be considered, and well to be represented, upon every hearing upon broadcasting licenses. The appropriate State is the only guardian *ad litem* that can readily be identified with that audience; under the peculiar necessities of the case, the State is the local spokesman and representative. If participation by a State in such litigation is extraordinary, it is a natural incident to other extraordinary features of radio and its regulation.

By §2 of the Act, the United States is divided into five zones, and the States constituting each zone are named. §9, as enacted in 1927, provided as follows:

> "The licensing authority, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.
>
> "In considering applications for licenses and renewals of licenses, when and in so far as there is a demand for the same, the licensing authority shall make such a distribution of licenses, bands of frequency of wave lengths, periods of time for operation, and of power among the different States and communities as to give fair, efficient, and equitable radio service to each of the same."

Different language, also recognizing certain rights of the States, appeared in the bills originally passed by the House and Senate. These bills differed in certain other respects, leading to the conference committee and its re-

port which became the Act, but each bill contained certain language following after that now found in §4, subsection (d), making such grant of power to the licensing authority read as follows:

> "Determine the location of classes of stations or individual stations (with due consideration of the right of each State to have allocated to it, or to some person, firm, company or corporation within it, the use of a wave length for at least one broadcasting station located or to be located in such State, whenever application may be made therefor) and the kind of apparatus to be used, with respect to its external effects."

After the conference report, there was much debate as to whether, in view of the identical language upon that subject in the two bills originally passed, the conferees were empowered to change the language at all, and also whether the change made was material (68 Cong. Rec. 2557, 2563, 2568-2569, 2575-2576, 3258-3262, 3329-3335).

In the subsequent Congress it was asserted, as a reason for amending the second paragraph of §9, that some members of the Federal Radio Commission were interpreting the provision otherwise than Congress had intended, and without due regard for the interests of individual States (69 Cong. Rec. 4488-4489, 4562-4563, 4608-4609, 5116-5117). The proposed amendment was adopted (45 Stat. 373; petitioner's brief, 144) and in part provides as follows:

> "It is hereby declared that the people of all the zones established by §2 of this Act are entitled to equality of radio broadcasting service, both of transmission and of reception, and in order to provide such equality the licensing authority shall as nearly as possible make and maintain an equal allocation of broadcasting licenses, of bands of frequency or wave lengths, of periods of time for operation, and of station power,

to each of said zones when and in so far as there are applications therefor; and shall make a fair and equitable allocation of licenses, wave lengths, time for operation, and station power to each of the States, the District of Columbia, the Territories and possessions of the United States within each zone, according to population. * * * Allocations shall be charged to the State, District, Territory, or possession wherein the studio of the station is located and not where the transmitter is located."

It thus appears, from the language of the Act and from its history, that an individual State is regarded as having certain peculiar rights relative to the allocation of licenses for radio broadcasting, and is given power to appear and to appeal, to protect those rights.

3. *Those rights do not wait until the Secretary of Commerce becomes the licensing authority.*

It may be suggested that the only express authorization for a State to take any appeal is found in §5, which is chiefly concerned with a condition which has never arisen —the practice which shall obtain when the licensing power, in the first instance, has devolved upon the Secretary of Commerce, and the Commission acts upon it in an appellate capacity. Under the Act of 1927 that change of function was to have taken place a year after the first meeting of the Commission; it has been three times deferred, most recently for an indefinite period.

That some provisions of §5 were immediately effective, is sufficiently proven by its last paragraph, wherein is the requirement that a "waiver" be exacted from each applicant. Much significance has been attached, in the de-

bates in Congress and in debates since, to that provision, and to its history. Whatever it means, everybody agrees it was intended to be immediately effective, because it is expressly made applicable, not only to granting of licenses by the Secretary (after he shall become the licensing authority) but also to granting of licenses by the Commission (which is the licensing authority for the first year and its extensions).

A similar inference is readily to be drawn from the preceding paragraph of §5, which is the one now most directly involved:

> "Decisions by the commission as to matters so appealed [*i. e.*, from the Secretary, sometimes by a State as appellant] *and as to all other matters over which it has jurisdiction* shall be final, subject to the right of appeal herein given."*

We believe that if Congress had intended the italicized language to mean, "and as to all other matters over which it shall have jurisdiction after the Secretary shall become the licensing authority", it would have said so.

The reports and debates in Congress are more concerned with other and controversial features of the legislation; they are somewhat scant in their references to the appeal provisions; and in view of the general suspicion directed toward the licensing authority, this scantiness of reference is an indication that the appeal provisions were broad, and not unusual. What can be found suggests no intent to make the licensing authority less subject to court review, for the first year, than thereafter. On the contrary, such reference as can be found, like the impressive absence of reference, suggests an intent to make the licensing authority, at all times and in all matters, subject to a very complete power of review.

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* Italics and bracketed matter inserted.

If there was anything unusual, or exceptional, depending upon particular parties or a particular time, in the provisions for court review, it escaped any notice in the statement which accompanied the conference report to the House, and its references to §§5 and 16 of the bill (69 Cong. Rec. 2563; the latter reference is quoted in this brief, note on page 10).

The commentary made by Frank Scott, Esq. (then Congressman from Michigan and Chairman of the House committee having the legislation in charge) when presenting the conference report on the floor of the House, indicates his view that no great difference in the scope of review was to result after the first year (69 Cong. Rec. 2565):

> "The Commission, under the provisions of the House bill, was an appellate division; under the compromise bill for the first year they are not an appellate division; they are a commission of original jurisdiction, but thereafter they occupy very largely the position provided in the original House bill, as an appellate body. Now, it is inconceivable that with several thousand stations throughout the United States there will not after the first year be appeals from the decisions of the Secretary of Commerce and that there will not during the first year be appeals from the decisions of the Commission itself, and therefore the House conferees and Senate conferees were unanimous in the thought that we ought to afford to the citizens of the country every opportunity to have a full hearing of their controversial matters."

4. *A narrow interpretation of the appeal provisions produces unreasonable results.*

In the present case the State is in sympathy with the unsuccessful application for license. Whether the State be allowed to participate, in the present case, is not important in itself.

In the present case, so far as appears, no part of the great radio public, and no licensee, has been adversely affected by the applicant's success before the Court of Appeals. So far as public interest has been manifested, it is all with the applicant, and there appears to be no adverse private interest.

Few cases will present this situation.

Congress realized that, as is shown by its broad reference, in §5 of the Act, to various parties who might be "aggrieved or whose interests are adversely affected." All these were specifically given a right of appeal, at least from the Secretary to the Commission.

Section 16 was written in fulfillment of a conference agreement that a distinction be made between the two principal classes of appeals. Those from denials of applications were to be brought on for hearing in Washington, presumably for the greater convenience of the Commission. But in appeals from revocations, each appellant was intended to have an option; if he chose he might bring his appeal before the District Court of his locality instead of coming to Washington. We believe emphasis was on the class of appeal, and the references to particular appellants were not intended to exclude all other parties from appellate litigations.*

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* In sec. 8 of the bill passed by the House was the following provision: "Any person interested in or aggrieved by any decision of the commission with respect to the granting or refusal of a permit or license or the revocation of a license, may appeal therefrom to the Court of Appeals of the District of Columbia."

69 Cong. Rec. 2563, appears the following, being part of a formal statement submitted to the House with the conference report: "Section 16 provides for appeals and is a compromise between the views of the two Houses. By the terms of the House bill all appeals were to the Court of Appeals of the District of Columbia. Under this provision all appeals except as to revocation of licenses go to the Court of Appeals of the District of Columbia. Appeals upon questions of revocation may be taken either to the Court of Appeals of the District of Columbia or to the District Court of the United States in the district in which the station and apparatus covered by the license is located."

It is true that the licensing authority will always be a party respondent, and if the proceedings before the court were limited to a review of its determinations, upon the original records, it might carry on satisfactorily as a universal and sole party respondent. Such is not the case. If the already overburdened Commission is to have exclusive responsibility for making up and defending new records before the Court of Appeals, in cases involving the interests of various communities in the forty-eight States, and necessarily affecting other licensees than the appellants, it will have an impossible task of representation. It is more reasonable, and we believe was intended, that the other parties in interest, who are explicity given permission to appear before the Commission and make up one record, should participate in the ensuing litigation involving a new record, perhaps greatly amplified.

Even more serious is the result, if the references to particular appellants in §16 are taken as exclusive, and a limitation upon all that is said in §5. Such an interpretation means that in many cases a party, concededly having an interest in the matter before the Commission, and obviously prejudiced by its determination, will be denied any appeal to the courts. Appellate review is given to one party, but not to the other. If the Commission denies an application, or revokes a license, the applicant or licensee is given an appeal. But if the Commission grants the application, or declines to revoke the license, which actions will usually affect the rights of other licensees, and of communities, and equality of service between States, then (it is said) there is no appeal. The unfair tendency of this proposition is aggravated by the claim of the Commission, made in the present case, that a *grant* of a *limited* license, upon an application for an *unlimited* license, is not a *denial*, and hence not appealable by anybody.

We believe that Congress intended no such result.

We submit that the unreasonable consequences which will flow from a narrow interpretation should be avoided. To do that, it is only necessary to interpret, in its usual sense, the language in §5 of the Act:

> "Decisions by the Commission as to matters so appealed and as to all other matters over which it has jurisdiction shall be final, subject to the right of appeal herein given."

POINT III.

The limited license issued to Station WGY at Schenectady, N. Y., would not give the broadcasting service which public convenience, interest or necessity requires.

The people of New York State endeavored to be heard before the Radio Commission, but were not afforded a hearing. We understand it to be the Commission's position that an application by General Electric Company for some specific frequency assigned to the First Zone was a prerequisite to the granting of any hearing (R. 179-180).

The Commission, without affording any hearing, first decided for itself how licenses should be allocated, to the zones, States, and stations; and left WGY either to have a limited license, or to be an applicant in hostility to some neighboring full time licensee. Such a regulation might be proper after an original allocation based upon hearings and evidence, but we think that there was no necessity for making the original allocation in a manner having at least the appearance of arbitrariness.

It is the due process of childhood, when instituting a game of pussy-wants-a-corner, to determine, by counting out or recognizing priorities, who shall be exempted, at the first, from seeking another's post. With complete respect (and some misgivings upon the score of dignity) we suggest that the procedure prescribed by the Commission has similarities to the childhood game, but the original allocation was done upon the fiat of the Commission. We *doubt* the fairness of the procedure, to the extent suggested; but what we urge (it is sufficient for our interests) is that the present record establishes the right of WGY and the community served by it to have been placed in the favored class, with only the burden of defensive litigation.

The application made by the State to the Commission (R. 172-178) declares its reasons, and the interest of its people in this proceeding, as follows:

"Under date of September 11, 1928, the Commission has designated WGY as a limited or part time station, and has made it a daytime station only, thus cutting off from our citizens the real benefits of broadcasting service, those of the evening hours when people are in their homes.

You have given these evening hours to Montana and other states in the far west. Having done so, the Commission states that it will make no reallocation of wave lengths to the different zones; that WGY cannot ask to have this situation remedied, but must seek to take away from other stations in the first zone the assignments which the Commission has given to those stations (Letter of Louis G. Caldwell, representing the Commission, to WGY, October 18, 1928). In other words, you have ruled that WGY cannot give evening broadcasting service unless some other station in New York is compelled to stop. What WGY

formerly had has gone to the citizens of other less populated states, and all of central, northern and eastern New York and large portions of the States of Vermont, New Hampshire and Massachusetts must after November 11th obtain their evening service from New York City or Boston, or not at all. We wonder if the Commission fully understood the result of this assignment, and that stations in New York City and Boston *as a fact* cannot be heard with any quality of clearness throughout most of this vast territory with its great number of inhabitants having been served and accustomed for years to be served with evening broadcasting from WGY. It is a matter of degree, but of such a degree as to have further consideration in the interests of public necessity and convenience. The communities of Albany, Troy, Schenectady, Amsterdam, Utica and many other cities and all of the villages and country districts of the north and east and to the Canadian border are affected.

That the General Electric Company has another broadcasting station in California which it may operate during the evening hours (the attitude apparently taken by the Commission) is no answer to our public and indicates a distribution of wave lengths and station hour assignments from the standpoint of the operating stations and not on the ground of public convenience and necessity.

The section of New York we are interested in on this application had before the enactment of the Radio Act of 1927 at least a priority in service, and has an equal if not a prior right to continued evening service under the terms of the Act of 1927. Shutting off that service *entirely* for the benefit of new areas is, we believe, inequitable and not contemplated by the Federal Radio Act.

All determinations of the Commission, whether it be the allocation of wave lengths to the different zones or station assignments of frequencies and operating time are open for hearing before the Commission within the purview of the statute. The more far-reaching orders must be open to correction as well as the lesser orders, if Congress meant anything by the right to a hearing.

WGY of all the 1000 licensed broadcasting stations was fourth in point of time, and has operated in New York State on the wave length of 790 kilocycles ever since May, 1923.

Without in this application presenting all the facts which may develop upon a hearing, if one is accorded, it may incidentally be said that New York State has the greatest system of hospitals in the Union, many of which are located in the area served by WGY. Here, too, are federal hospitals. Appended to this application are pleas for WGY service from the federal soldiers at the Veterans' Disabled Hospital at Tupper Lake, N. Y., many of whom are confined to their beds twenty-four hours of the day. They show the public necessity of evening service in the interest of the health of these men, over 350 in number. It will be taken away from them on Armistice Day, November 11th.

The State Hospital for Consumptives at Raybrook, near Saranac and Lake Placid, has 300 patients, each room of the hospital being equipped with radio receiving apparatus used constantly for the patients with programs from WGY only.

Governmental activity of the State of New York at Albany is affected as well. The State Department of Health

has heretofore protested to the Commission, to the end that it may maintain its public health talk service over WGY. The Department has been using this broadcasting service through WGY since March, 1922. Talks are given weekly and more than 325 of them have taken place. It is the most important health publicity in the State of New York and is carried on as state work in the interests of adult and child health protection and having its large influence in the control of epidemic diseases.

The Department of Agriculture and Markets has used WGY since March 15, 1922, for its daily Market Report, and since 1925 for its weekly Crop and Market Summary. Crop Estimates also are sent out by the State, and WGY maintains an agricultural program through its Farm Forum, all for the benefit of our rural section served only by WGY.

New York State wants for its citizens the continued full time service of WGY or some other station equally as good. As matters now stand, about three millions of our people will be deprived of all evening service over WGY after November 11, 1928, and this for the education and entertainment of other sections of the country which years later have been introduced to broadcasting service.

We fully appreciate the great difficulties of the Commission in its administration of the Federal Radio Act. This application is made in no jealous spirit, but merely to request the continuance of the time-honored broadcasting service heretofore furnished three-fourths of the Empire State. Later comers should give way before we are asked to do so."

POINT IV.

The limited license issued to Station WGY would not carry into effect the equality of radio broadcasting service which the People of the State of New York and the first zone are entitled to under the provisions of the Federal Radio Act.

While the zones were mentioned and defined in the Radio Act of 1927, little emphasis was placed upon them. Bands of frequency or wave lengths were to be assigned by the Commission to the various classes of stations, and this distribution was to be so made:

> "* * * among the different states and communities as to give fair, efficient and equitable radio service to each of the same."

The Davis Amendment of 1928 laid an increased emphasis upon the zones, and the states. It was a mandate, of a sort, to the Commission.

By General Order No. 40 of August 30, 1928 (R. 100-103) the Commission allocated bands of frequency, eight each to all of the five zones. That of course was equality in number of bands. But does the Radio Act require exactly that? The statute says the Commission shall "*as nearly as possible*" make and maintain an equal allocation. The Commission was to have some administrative work and duty to secure and maintain "equality of radio broadcasting service" in the public interest, and it could have given any zone a lesser number of bands if the public interest demanded it; otherwise what was the use of the Federal Radio Commission. As a matter of fact, and recently made a matter of official report in Congress*, the

* On December 12, 1929, in compliance with the Sackett resolution (S. Res. 166) the Commission submitted to the Senate a statistical analysis of distribution of facilities among the five zones. The First Zone was shown as having approximately 27 per cent of the aggregate power used by stations over the entire country. This is an excess, but power has not been suggested by anyone as an issue in the case of WGY. In all other respects, the First Zone is under its quota. In number of licenses, it has 18.768 per cent. In frequency distribution, it has 17.618 per cent. In percentage of time of night operations, it has 15.552 per cent.

Commission has not pursued any such policy of undeviating mathematical equality between the zones as is the premise of General Order number 40 and the Commission's prescribed procedure for license applications. This being so, we cannot understand the attitude manifested by the Commission in regard to the present case, that having once made its allocation of bands to the different zones, such allocation is past question or attack by the public, and no application will be heard that might require any disturbance of the allocation between zones.

Passing that and attending to the equitable allocation of wave lengths once set apart to a zone, we arrive at the question why the metropolitan centers should have all the evening broadcasting service to the detriment of three-fourths of the rest of New York State and the large unserved areas of Vermont, New Hampshire and Massachusetts. Assigning wave lengths and station licenses, "within each zone, according to population", cannot mean that the large cities shall have all the service simply because the greater number of people are there. Some attention must be given, in "a fair and equitable allocation", to the *distribution of population*, and to station location, wave lengths and power to reach that separated population.

The order of the Court of Appeals serves those purposes, and the limited license to WGY which it displaced would not serve those purposes. We respectfully submit that the order should be undisturbed.

Albany, December 27, 1929.

HAMILTON WARD,
Attorney General of the State of New York,
Attorney for its People.

CLAUDE T. DAWES,
Solicitor General,
HENRY S. MANLEY,
Assistant Attorney General.